

United States
Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Appellee.

and

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,
Appellant,

vs.

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Appellee.

Supplemental Transcript of Record

Upon Appeals from the District Court of the
United States for the District of Montana.

FILED

MAY 17 1941

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INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

	Page
Ethel M. Doheny as administratrix of the estate of Roberta Doheny vs. John M. Coverdale et al.	
Affidavit of Service of Replies of Plaintiff to the Answer of Defendants Coverdale and Johnson and Defendant John M. Coverdale..	272
Answer of Defendants Coverdale and Johnson	257
Answer of Defendant John M. Coverdale	249
Complaint	241
Execution Writ	281
Notice of Appeal	276
Notice of Filing Remittitur	280
Order for Judgment	278
Order taxing costs and Disbursements	273
Reply to answer of defendants Coverdale and Johnson	264
Reply to answer of Defendant John M. Cover- dale	268
Verdict	275

Index	Page
Ethel M. Doheny as Administratrix of the estate of Marguerite Doheny, deceased, vs. John M. Coverdale, et al.	
Affidavit of Service of Replies of Plaintiff to the Answers of Defendants Coverdale and Johnson and John M. Coverdale	315
Answer of Defendants Coverdale and Johnson	291
Answer of Defendant John M. Coverdale	299
Complaint	283
Execution Writ	320
Notice of Appeal	317
Notice of Filing Remittitur	319
Order for Supplemental Record on Appeal	461
Reply to Answer of Defendants Coverdale and Johnson	311
Reply to Answer of Defendant John M. Cover- dale	307
Verdict	316
Consolidated Cases	
Bill of Exceptions	323
Certificate of Judge to Bill of Exceptions..	458
Instructions to the Jury	436
Motion for directed verdict	431
Order denying	433

Index	Page
Motion for non-suit	420
Order denying	422
Notice of Intention to Move for a New Trial	456
Objection Interposed during Argument of Counsel	453
Offer of proof	404
Order Denying Motion for New Trial	457
Settlement of Instructions	433
Witnesses for Defendants:	
Coverdale, John M.	
—direct	428
—cross	429
Holland, Frank	
—direct	423
—cross	426
Malmgren, Rudolph	
—direct	427
Witnesses for Plaintiff:	
Allard, Eva May	
—direct	373
Bernhardt, E.	
—direct	330
—cross	340
—redirect	342
—recross	344

Index	Page
Witnesses for Plaintiff (Cont.):	
Bertsche, William	
—direct	394
Blakeslee, E. H.	
—stipulation	362
Bohler, Mrs. J. S. (Helen)	
—direct	413
—cross	414
Chamberlain, Fred M.	
—direct	365
Dawson, Robert	
—direct	375
—cross	384
Doheny, Harry	
—direct	417
—cross	418
Doheny, Mrs. Ethel M.	
—direct	418
Fuller, Nellie B.	
—direct	407
Garrity, Clair	
—direct	349
—cross	358
Holland, Frank	
—direct	400
Howard, Dr. Lawrence L.	
—direct	366
—cross	372

Index

Page

Witnesses for Plaintiff (Cont.):

James, Herschel

—direct 386

—cross 391

—redirect 393

Johnson, Oscar (at coroner's inquest)

—direct 409

Malmgren, Rudolph

—direct 405

Mosier, Mrs. Amelia

—direct 411

—cross 412

Peterson, C. J.

—direct 402

Randall, Mrs. Mina C.

—direct 414

Sherman, Hugh I.

—direct 415

Thompson, Jack

—direct 324

Ugrin, Joe

—direct 395

—cross 397

—redirect 398

Woodward, R. J.

—direct 329

Certificate of Clerk to Supplemental Transcript of Record on Appeal 461

Praeipie 464

PLAINTIFF'S EXHIBIT 1.

In the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade.

ETHEL M. DOHENY, as administratrix of the estate of ROBERTA DOHENY, deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON,
co-partners doing business under the firm name and style of COVERDALE & JOHNSON,
Defendants.

COMPLAINT

Comes Now the above named plaintiff and for a cause of action against the defendants herein complains and alleges:

I.

That on or about the 12th day of December, 1934, one Roberta Doheny died intestate and, thereafter, upon petition filed in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark by Ethel M. Doheny, the said District Court of Lewis and Clark County by an order in writing duly given, made and entered on the 8th day of April, 1935, appointed said Ethel M. Doheny Administratrix of the estate of said Roberta Doheny, deceased, and directed letters of administration on the estate of said decedent to issue to said Ethel M. Doheny

upon her taking oath and filing bond in said estate conditioned for the faithful performance of her duties as administratrix; and, thereafter, pursuant to said order letters of administration upon the estate of Roberta Doheny were duly issued by the said court under the seal of said court and the hand of the clerk thereof unto Ethel M. Doheny plaintiff herein. [1]

II.

That at all times hereinafter mentioned the defendants John M. Coverdale and E. O. Johnson were, at all time since have been, and now are co-partners doing business under the firm name and style of Coverdale & Johnson.

III.

That at all times during the month of December, 1934, the defendant E. O. Johnson, was the owner of a certain Ford Sedan automobile, Montana license number 13-1865 for the year 1934, and that said automobile was used in connection with the business of said John M. Coverdale and E. O. Johnson as co-partners.

IV.

That on the 11th day of December, 1934, and for a period of time immediately prior thereto, one George S. Bardon was in the employ of the said defendant and engaged in work directly connected with the performance by the defendants of that certain written contract theretofore entered into between said defendants and the state of Montana

through the Highway Commission of said state, which contract is hereinafter more particularly referred to.

V.

That on or about the 21st day of September A. D. 1934, the defendants made and entered into a certain written agreement with the state of Montana by and through the State Highway Commission of said state of Montana, whereby the said defendants in consideration of the payment or payments of [2] money specified in said contract promised and agreed to pay for all the materials and to furnish all tools, machinery and improvements and to do and perform all the work and labor in the construction or improvement of certain bridges in Lewis and Clark County, State of Montana, in connection with and as a part of a certain public highway in said county known as the Augusta-Sun River Road said bridges being particularly described in said written contract as "1 concrete bridge and 5 treated timber pile trestle bridges and stock passes". That thereafter on or about the 25th day of September, 1934, the said defendants commenced the construction and improvement work in accordance with the terms and provisions of aforesaid contract; and, thereafter, up to and including the 1st day of February, 1935 were engaged in the performance of the construction and improvement work specified in said contract.

VI.

That on or about the 20th day of October, 1934, the said defendants rented certain equipment from E. H. Blakeslee consisting of an Ersted two drum hoist with tractor power to be used in connection with the performance of the construction and improvement work specified in the above mentioned contract and that on or about said 20th day of October, 1934, the said defendants and E. H. Blakeslee entered into a written agreement whereby the use of said equipment was rented to the defendants at an agreed rental rate of \$84.00 per month and the said defendants promised and agreed to return said equipment and unload and deliver same to the said Blakeslee in the event the rental [3] period of such equipment should exceed thirty days. That thereafter on or about October 20, 1934, the defendants took possession and used said equipment for a period of approximately fifty-two days in the performance of the construction and improvement work specified in said agreement with the State of Montana and, thereafter, to-wit, at a time known to defendants but unknown to plaintiff and between December 1, 1934, and December 11, 1934, the said defendants shipped said equipment to Great Falls, Montana, for the purpose of redelivering the same to aforesaid E. H. Blakeslee.

VII.

That on or about the 10th day of December, 1934, at approximately 10 o'clock P. M. the aforesaid E. O. Johnson and George S. Bardon left Augusta,

Montana, traveling in the above mentioned automobile owned by E. O. Johnson with Great Falls, Montana, as their destination for the purpose of unloading and delivering to E. H. Blakeslee at Great Falls, Montana, in accordance with the terms of the aforesaid written agreement, the aforesaid equipment theretofore rented by the defendants from the said Blakeslee and at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls, Montana, while they unloaded and delivered aforesaid equipment and thereafter return to Augusta, Montana, the said Roberta Doheny and her sister Marguerite Doheny accompanied said E. O. Johnson and George S. Bardon to Great Falls, Montana, in said automobile arriving at Great Falls, Montana, at approximately 11:55 P. M. on the day of December 10, 1934. That upon their arrival at Great Falls Montana, the aforesaid equipment was unloaded and delivered by [4] said defendants to E. H. Blakeslee by and through the assistance at the time of the said E. O. Johnson and George S. Bardon. That after said equipment was unloaded and delivered to the said E. H. Blakeslee the said E. O. Johnson and George S. Bardon Roberta Doheny and Marguerite Doheny left Great Falls, Montana, in the above mentioned automobile with Augusta, Montana, as their return destination and by way of that public highway known as the Great Falls-Augusta road which is the main highway for public travel between Great Falls, Montana, and Augusta, Montana. That

at all times from and after the said persons left Great Falls, Montana, up to and including the time the automobile in which they were riding left the public highway and collided with the tree as hereinafter set forth the said George S. Bardon drove, operated and controlled the movements of said automobile under the direction of the said E. O. Johnson.

VIII. .

That when said automobile with the occupants aforesaid arrived at a point within Cascade County, Montana, on said public highway where same has and takes its direction and course through the town of Simms, Montana, the said George S. Bardon, while in the employ of the defendants as aforesaid and while under the direction of E. O. Johnson, drove and controlled said automobile in such a grossly negligent and reckless manner that said automobile while traveling at a speed of approximately between fifty and sixty miles an hour was permitted by him to turn directly from and move off and from said public highway and crash into and collide with a large tree growing approximately twelve feet away from and to the side of said public [5] highway in said Cascade County, Montana. That at the time and place on said highway when and where said automobile was permitted by the said George S. Bardon to leave said highway and collide with the tree aforesaid the said highway was approximately thirty feet wide in good and safe condition for travel by automobile

and other means of conveyance and extended in an approximate straight line with a clear and unobstructed view for a distance of approximately one-half mile West and approximately one mile East from the place on said highway where the automobile driven at the time by aforesaid George S. Bardon was permitted by said George S. Bardon to leave the public highway and crash into the tree as aforesaid.

IX.

That by reason of said automobile being permitted by the said George S. Bardon and the said E. O. Johnson to move off of and away from the public highway and collide with and crash into the tree as aforesaid the said Roberta Doheny was thrown and hurled against the front seat and interior of the said automobile with great force and violence and her body was battered, bruised and cut and as a result thereof she suffered and sustained severe and serious bodily injuries and suffered great bodily pain and mental anguish and thereafter on or about the 12th day of December, 1934, as a result of the injuries sustained by her as aforesaid Roberta Doheny died all to her great damage in the sum of \$50,000.00. That as a result of the injuries sustained at the time and place aforesaid Roberta Doheny was compelled to employ the services of a physician and obtain special hospital care and attention and become obligated for the payment of same [6] to her further damage in the sum of \$50.00.

X.

That at the time of the grossly negligent and reckless operation of the automobile as aforesaid and the infliction of the injuries upon Roberta Doheny, causing her death, the said Roberta Doheny was of the age of eighteen years, in good health and although she had not been employed in a gainful occupation for approximately three weeks she was capable of earning approximately \$60.00 per month and at the time of her death had arranged to resume employment the following month at a rate of compensation of approximately \$60.00 per month.

Wherefore, plaintiff prays judgment against the defendants in the sum of \$50,050.00 together with the cost and disbursements necessarily incurred in and by reason of the within action and for such other and further relief as may be proper.

HALL AND McCABE,
Attorneys for Plaintiff. [7]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is a member of the law firm of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing complaint and that, as one of said attorneys for plaintiff, affiant makes this affidavit of verification for and on behalf of plaintiff

for the reason that said plaintiff is absent from Cascade County, Montana, wherein her attorneys reside and maintain their office and where this affidavit of verification is made;

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 7th day of June, 1935.

[Notarial Seal] ANNE L. PEPOS,
Notary Public for the State of Montana, residing
at Great Falls, Montana.

My commission expires April 28, 1938.

[Endorsed]: Filed in state court June 7, 1935.
[8]

PLAINTIFF'S EXHIBIT 2.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
JOHN M. COVERDALE.

Comes now the defendant John M. Coverdale and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were, on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan automobile and that the same bore Montana License plates Number [9] 13-1865 for the year 1934. This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly

referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Roberta Doheny and her sister Marguerite Doheny did [10] accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934 in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant John M. Coverdale or by the defendant partnership Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Roberta Doheny and

Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta, Montana to Great Falls, Montana and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant John M. Coverdale or the defendant partnership, Coverdale & Johnson to permit or allow any person or persons and/or particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, and if the said Roberta Doheny and Marguerite Doheny did actually ride with the defendant E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile [11] at said time and place, on the invitation or with the permission or consent of the defendant E. O. Johnson, the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him

by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at the said time and place.

In this connection this answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan automobile at the said time and place, with the defendant E. O. Johnson and said George S. Bardon on the invitation or with the permission or consent of George S. Bardon, the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent or permission given unto him by this answering defendant or by the defendant partnership Coverdale & Johnson and that the said George S. Bardon was not then and there acting as a servant or agent of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason of the aforesaid the said Roberta Doheny

and Marguerite Doheny in [12] so riding in said Ford V-8 Sedan automobile were not invitees or guests of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson and further alleges that the death of the said Roberta Doheny, if resulting from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of this answering defendant or of the defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Roberta Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allega-

tions therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant prays that the plaintiff take nothing by her complaint and that [13] he recover his costs herein expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for defendant,
John M. Coverdale.

State of Montana

County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant, John M. Coverdale, in the above entitled action; that he makes this verification on behalf of said defendant John M. Coverdale, for the reason that said defendant is not now within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing
at Missoula, Montana.

State of Montana

County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant John M. Coverdale in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant John M. Coverdale upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of John M. Coverdale.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires August 2, 1938. [15]

[Endorsed]: Filed in state Court Nov. 27, 1935.

[14]

PLAINTIFF'S EXHIBIT 3.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
COVERDALE & JOHNSON, A CO-PART-
NERSHIP.

Comes now the defendant Coverdale & Johnson, a co-partnership, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan auto-[16] mobile and that the same bore Montana License plates Number 13-1865 for the year 1934.

This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Roberta Doheny and her sister Marguerite Doheny did [17] accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934 in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta, Montana to Great Falls, Montana, and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant, Coverdale & Johnson to permit or allow any person or persons and/or particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Roberta Doheny and Marguerite Doheny did so without the

consent, permission, invitation or authority of the defendant Coverdale & Johnson, and if the said Roberta Doheny and Marguerite Doheny did actually ride with the defendant E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile at said time and place, on the invitation or with the permission or consent of the defendant E. O. Johnson, the [18] said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at said time and place.

In this connection this answering defendant further alleges that if the said Roberta Doheny and Marguerite Doheny did actually ride in said Ford V8 Sedan at said time and place, with the defendant E. O. Johnson and George S. Bardon, on the invitation or with the permission or consent of George S. Bardon the said George S. Bardon was then and there acting in his own behalf and outside of the scope of any authority, consent or permission given unto him by this answering defendant, Coverdale & Johnson and the said George S.

Bardon was not then and there acting as a servant or agent of the defendant Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason of the aforesaid the said Roberta Doheny and Marguerite Doheny in so riding in said Ford V-8 Sedan were not invitees or guests of the defendant Coverdale & Johnson, and further alleges that [19] the death of the said Roberta Doheny, if resulting from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of this answering defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Roberta Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that it has not sufficient information upon which to base a belief with respect

thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant prays that the plaintiff take nothing by her complaint and that it recover its costs herein expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for defendant,

Coverdale & Johnson. [20]

State of Montana

County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant Coverdale & Johnson in the above entitled action; that he makes this verification on behalf of said defendant, Coverdale & Johnson, a co-partnership, for the reason that none of the officers or agents of said co-partnership are within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires April 22, 1937.

State of Montana

County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their offices in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant Coverdale & Johnson upon the attorneys for the plaintiff by depositing in the United States Postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of Coverdale & Johnson.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires August 2, 1938. [22]

[Endorsed]: Filed in state Court Nov. 27, 1935.
[21]

PLAINTIFF'S EXHIBIT 4

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANTS COVERDALE & JOHNSON,
A CO-PARTNERSHIP.

For reply to the separate answer of defendant, Coverdale & Johnson, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and,

denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson to permit or allow any person or persons and particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph VI of said answer.

Further replying to paragraph VI of said answer plaintiff denies that at the time of riding in said Ford V8 Sedan automo- [23] bile belonging to defendant E. O. Johnson with the said defendant E. O. Johnson and George S. Bardon the said Roberta Doheny and Marguerite Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson; and, denies that at the time and place said Roberta Doheny and Marguerite Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there

acting in the scope of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O. Johnson and George S. Bardon on the invitation and with the permission and consent of said George S. Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto [24] him by said defendant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting as a servant and agent of the defendant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson; and, denies that the death of said Roberta Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the

result of any of the acts or omissions of said answering defendant Coverdale & Johnson.

Wherefore, having fully replied to the answer of said defendant Coverdale & Johnson plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [25]

State of Montana,
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County Montana where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE

Subscribed and sworn to before me this 4th day of March, 1936.

[Seal]

EDW. C. ALEXANDER

Notary Public for the State
of Montana, Residing at
Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed in State Court March 5, 1936.

PLAINTIFF'S EXHIBIT 5

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANT JOHN M. COVERDALE

For reply to the separate answer of defendant, John M. Coverdale, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and, denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson and defendant John M. Coverdale to permit or allow any person or persons and particularly said Roberta Doheny and Marguerite Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph [27] VI of said answer.

Further replying to paragraph VI of said answer plaintiff denies that at the time of riding in said Ford V8 Sedan automobile belonging to defendant E. O. Johnson with the said defendant E. O. John-

son and George S. Bardon the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that at the time and place said Roberta Doheny and Marguerite Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there acting in the scope of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O. Johnson and George [28] S. Bardon on the invitation and with the permission and consent of said George

S. Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto him by said defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said George S. Bardon was not then and there acting as a servant and agent of the defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Roberta Doheny and Marguerite Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Roberta Doheny and Marguerite Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the death of said Roberta Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of said answering defendant Coverdale & Johnson and defendant John M. Coverdale.

Wherefore, having fully replied to the answer of said defendant John M. Coverdale plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [29]

State of Montana,
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County, Montana, where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE

Subscribed and sworn to before me this 4th day of March, 1936.

[Seal]

EDW. C. ALEXANDER

Notary Public for the State
of Montana. Residing at
Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed March 5, 1936 in State Court.

[30]

PLAINTIFF'S EXHIBIT 6

[Title of State Court and Cause.]

AFFIDAVIT OF SERVICE

State of Montana,
County of Cascade—ss.

Marie V. Dionne being first duly sworn upon her oath deposes and says:

That she is over the age of twenty-one years and is not interested in the above entitled action;

That Hall & McCabe appear as attorneys of record for the plaintiff in said action and have and maintain their office at Great Falls, Montana; and, that Messrs. Howard Toole and W. T. Boone appear as attorneys of record for the defendants Coverdale & Johnson, a co-partnership, and John M. Coverdale personally in said action and have and maintain their office in the Montana Building at Missoula, Montana;

That there is a regular and daily communication by United States mail between Great Falls, Montana, and Missoula, Montana;

That on the 5th day of March, 1936, this affiant at the request of the above named attorneys for the plaintiff served copies of the replies of plaintiff to the separate answers of defendants Coverdale & Johnson and defendant John M. Coverdale upon the

[31]

attorneys for said defendants by depositing in the United States post office at Great Falls, Montana, true and correct copies of said replies and each thereof in a sealed envelope with postage prepaid

thereon addressed to Messrs. Howard Toole and W. T. Boone, Attorneys at Law, Montana Building, Missoula, Montana for transmission and delivery to said attorneys for said defendants in regular course of mail.

MARIE V. DIONNE

Subscribed and sworn to before me this 5th day of March, 1936.

[Seal]

E. McCABE

Notary Public for the State
of Montana. Residing at
Great Falls, Montana.

My commission expires July 15, 1936.

[Endorsed]: Filed March 5, 1936, in State Court. George Harper, Court Clerk; Thomas T. Davies, Deputy. [32]

PLAINTIFF'S EXHIBIT 7

[Title of State Court and Cause.]

ORDER TAXING COSTS AND
DISBURSEMENTS

The motion filed herein by the defendants John M. Coverdale and Coverdale & Johnson, a co-partnership, to have the court tax the costs and disbursements in the above entitled action and to correct and modify the memorandum of costs and disbursements filed herein by the plaintiff, having duly and regularly come on for hearing, and the court being fully advised in the premises,

It Is Ordered, that the memorandum of costs and disbursements in the above entitled action are taxed, determined and allowed by the court as follows:

Clerk's Fees:

Filing complaint	\$ 5.00
Entry of judgment.....	2.50

Sheriff's fees:

Serving summons	1.51
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Witnesses' Fees:

Mrs. Mosier, 140 miles @ 7¢ \$9.80, 2 days \$6.....	\$15.80
Mrs. J. S. Bahler, 140 miles @ 7¢ \$9.80, 2 days \$6.....	15.80
Clare Garrity, one day.....	3.00
E. Bernhardt, one day.....	3.00

[33]

Fred Chamberlain, 108 mi. @ 7¢ \$7.56 2 days \$6.....	13.56
Mrs. L. L. Randal, 108 mi. @ 7¢ \$7.56 2 days \$6.....	13.56
H. W. Doheny, 108 mi. @ 7¢ \$7.56 2 days \$6.	13.56
Eva May Allard, 2 days.....	6.00
Dr. L. L. Howard, 2 days.....	6.00
Robert Dawson, 64 miles @ 7¢ \$4.48, 2 days \$6.....	10.48
Joe Ugrin, 138 miles @ 7¢ \$9.66, 2 days \$6.....	15.66
Herschel James, 64 miles @ 7¢ \$4.48, 2 days \$6.....	10.48
Rudolph Malmgren, 64 miles @ 7¢ \$4.48, 2 days \$6.....	10.48
Frank Holland, 64 miles @ 7¢, \$4.48, 2 days \$6.....	10.48
Wm. Bertsche, 2 days.....	6.00
Nellie Fuller, 2 days.....	6.00
H. I. Sherman, 2 days.....	6.00
Jack Thompson, 2 days.....	6.00
J. Woodward, 2 days.....	6.00

Total witness fees and mileage.....\$177.86
 ½ of witness fees and mileage.....

88.93

Miscellaneous costs:

Jack Thompson, photographs.....	15.00	
Jack Raftery, Notary Public fees taking depositions of Clare Garrity and E. Bern- hardt	22.90	
		<hr/>
Total miscellaneous costs.....	37.90	
1/2 thereof		18.95
		<hr/>
Total Costs and Disbursements		\$116.89

Dated this 15 day of May, 1936.

W. H. MEIGS

Judge.

[Endorsed]: Filed May 15, 1936, in State Court.

[34]

PLAINTIFF'S EXHIBIT 8

[Title of State Court and Cause.]

VERDICT

We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Roberta Doheny, deceased, and against the defendants, John M. Coverdale and E. O. Johnson co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of \$5,000.00.

Dated this 2nd day of May, 1936.

CLARENCE W. WILSON,

Foreman.

[Endorsed]: Filed May 2, 1936 in State Court.

[35]

PLAINTIFF'S EXHIBIT 10

[Title of State Court and Cause.]

NOTICE OF APPEAL

To: Ethel M. Doheny, Administratrix of the Estate of Roberta Doheny, deceased, the plaintiff in the above entitled action, and to Messrs. Hall and McCabe, the plaintiff's attorneys and to each of you:

You and Each of You are hereby notified that John M. Coverdale, and Coverdale and Johnson, a co-partnership, defendants in the above entitled action, hereby appeal to the Supreme Court of the State of Montana, from that certain judgment made, given, returned, entered and filed in the above entitled action, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on the 4th day of May, 1936, as modified by that certain Order Taxing Costs and Disbursements, made, entered and filed in the above entitled action on the 15th day of May, 1936, which said judgment, as modified by said order is in favor of the plaintiff, Ethel M. [36] Doheny, administratrix of the estate of Roberta Doheny, deceased, and against the said defendants, John M. Coverdale and Coverdale and Johnson, co-partners, and is in the sum of five thousand (\$5,000.00) dollars, principal, and interest from the date of said judgment until paid, at the rate of six (6) per cent, together with plaintiff's costs, taxed in the sum of one hundred sixteen and 89/100 (\$116.89) dollars.

This appeal is from said judgment and from the whole thereof.

Dated this the 31st day of August, 1936.

HOWARD TOOLE

W. T. BOONE

Attorneys for John M. Coverdale and Coverdale and Johnson.

State of Montana,
County of Missoula—ss.

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson and defendant John M. Coverdale in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 31st day of August, 1936, this affiant served a copy of the foregoing Notice of Appeal, upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & Mc-

Cabe, Attorneys at law, Strain Building, Great Falls, Montana, a true copy of said Notice of Appeal.

VALBORG MOE.

Subscribed and sworn to before me this 31st day of August, 1936.

[Seal]

W. T. BOONE

Notary Public for the State
of Montana; residing at
Missoula, Montana.

My commission expired August 2nd, 1938. [38]

[Endorsed]: Filed Sept. 2, 1936, in State Court.

[37]

PLAINTIFF'S EXHIBIT 11

In the Supreme Court of the State of Montana

(Affirmed)

March Term A. D. 192..... 1937

7630.

The Chief Justice of the Supreme Court of the
State of Montana:

To the Honorable Judge of the District Court of
the Eighth Judicial District, in and for the County
of Cascade, Greeting.

Whereas, in the said district court in a cause
between Ethel M. Doheny, Administratrix of the
Estate of Roberta Doheny, deceased, Plaintiff and
Respondent, and John M. Coverdale and E. O.
Johnson, Defendants and Appellants wherein the

judgment of the said district court, entered in said cause on the 4th day of May A. D. 192.....1936 as modified, May 15, 1936, was in favor of the said plaintiff and respondent and against the said defendants and appellants as by the inspection of the transcript of record of said court in said cause which was brought into the Supreme Court of said state by virtue of an appeal, agreeably to the statute of said state and the rules of said Supreme Court in such case made and provided, fully and at large appears.

And Whereas, in the March term of This Court in the year of our Lord, one thousand nine hundred and Thirty-seven said cause came on to be heard before said Supreme Court and was argued by counsel.

Whereupon, on consideration, it is now here adjudged by this Court [39] that the judgment of the said Court below, entered in this cause on the 4th day of May A. D. 192..... 1936 as modified, May 15, 1936; Judgment affirmed.

Costs in this Court:

Appellant Appearance \$.....

Respondent Appearance \$.....

Remittitur \$1.80

Said judgment to be carried into execution according to the terms thereof.

May 20, A. D. 192....., 1937.

You, Therefore, are hereby commanded that such execution and further proceedings be had in said

cause as, according to right and justice, and the laws of the State of Montana ought to be had, said appeal notwithstanding.

Witness: The Honorable W. B. Sands, Chief Justice of the Supreme Court of the State of Montana, this 4th day of June, A. D. 192..... 1937.

[Seal of the Supreme Court of the State of Montana.]	A. T. PORTER	Clerk of the Supreme Court of the State of Montana.
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[Endorsed]: Filed June 5, 1937 in State Court.

[40]

PLAINTIFF'S EXHIBIT 12

[Title of State Court and Cause.]

NOTICE OF FILING REMITTITUR

To the above named Defendants and to Messrs. Howard Toole and W. T. Boone, their Attorneys:

You, and Each of You, will please take notice that on June 5, 1937 Remittitur from the Supreme Court of the State of Montana affirming the judgment in the above entitled court and cause was filed in the above entitled Court.

Dated this 5th day of June, 1937.

E. J. McCABE

H. C. HALL

Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1937 in State Court.

[41]

PLAINTIFF'S EXHIBIT 13

[Title of State Court and Cause.]

EXECUTION WRIT

The State of Montana,

To the Sheriff of County of Deer Lodge, Greeting:

Whereas, on the 4th day of May, A. D. 1936 Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, deceased, recovered a Judgment in the said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against John M. Coverdale and E. O. Johnson co-partners doing business under the name and style of Coverdale & Johnson, for the sum of Five thousand and no/100 (\$5,000.00) Dollars damages, with interest from May 4, 1936, at the rate of six per cent per annum until paid; together with her costs and disbursements at the date of said judgment, and accruing costs amounting to the sum of One Hundred Sixteen and 89/100 (\$116.89) Dollars as appears to us of Record.

And Whereas, the Judgment Roll, in the action in which said Judgment was entered, is filed in the Clerk's office of said Court, in the County of Cascade, and the said Judgment was docketed in said Clerk's office, in the said County, on the day and year first above written. And the sum of \$5,116.89 with interest from May 4, 1936, at the rate of six per cent per annum is now (at the date of this writ) actually due on said Judgment.

Now, You the said Sheriff, are hereby required to make the said sum due on the said Judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said Judgment, out of the personal property of the said debtors, or if sufficient personal property of said debtors cannot be found, then out of the real property in your county belonging to said debtors, on the day whereon said Judgment was docketed in the said County, or at any time thereafter, and make return of this Writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness: The Hon. C. F. Holt, Judge of the said Eighth Judicial District of the State of Montana, at the Court House in the County of Cascade, this 17th day of August A. D. 1937.

Attest: my hand and the seal of said Court, the day and year last above written.

[Seal]

GEORGE HARPER

Clerk

By H. J. SKINNER

Deputy Clerk

Sheriff's Office

County of Deer Lodge, Montana,

I hereby certify that I received the within Execution on August 18th, 1937, and after checking in the County Assessor's Office and inquiring about town I cannot find any property belonging to John M. Coverdale personally or belonging to the co-

partnership of John M. Coverdale and E. O. Johnson.

Dated this 21st day of August, 1937.

BARNEY L. LARSEN,

Sheriff,

By JOE SCHULTZ,

Under Sheriff. [42]

Filed Sept. 8, 1937 in State Court.

PLAINTIFF'S EXHIBIT 14

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the
County of Cascade

ETHEL M. DOHENY, as administratrix of the
Estate of MARGUERITE DOHENY, deceased,
Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON
co-partners doing business under the firm name
and style of COVERDALE & JOHNSON,
Defendants.

COMPLAINT

Comes Now the above named plaintiff and for a
cause of action against the defendants herein com-
plains and alleges:

I.

That on or about the 12th day of December, 1934, one Marguerite Doheny died intestate and, thereafter, upon petition filed in the District Court of the First Judicial District of the State of Montana in and for the County of Lewis and Clark by Ethel M. Doheny, the said District Court of Lewis and Clark County by an order in writing duly given, made and entered on the 8th day of April, 1935, appointed said Ethel M. Doheny Administratrix of the estate of said Marguerite Doheny, deceased, and directed letters of administration on the estate of said decedent to issue to said Ethel M. Doheny upon her taking oath and filing bond in said estate conditioned for the faithful performance of her duties as administratrix; and, thereafter, pursuant to said order letters of administration upon the estate of Marguerite Doheny were duly issued by the said court under the [43] seal of said court and the hand of the clerk thereof unto Ethel M. Doheny plaintiff herein.

II.

That at all times hereinafter mentioned the defendants John M. Coverdale and E. O. Johnson were, at all times since have been, and now are co-partners doing business under the firm name and style of Coverdale & Johnson.

III.

That at all times during the month of December, 1934, the defendant E. O. Johnson, was the owner of a certain Ford Sedan automobile, Montana license number 13-1865 for the year 1934, and that said automobile was used in connection with the business of said John M. Coverdale and E. O. Johnson as co-partners.

IV.

That on the 11th day of December, 1934, and for a period of time immediately prior thereto, one George S. Bardon was in the employ of the said defendant and engaged in work directly connected with the performance by the defendants of that certain written contract theretofore entered into between said defendants and the state of Montana through the Highway Commission of said state, which contract is hereinafter more particularly referred to.

V.

That on or about the 21st day of September A. D. 1934, the defendants made and entered into a certain written agreement with the state of Montana by and through the State Highway Commission of said state of Montana, whereby the said defendants [44] in consideration of the payment or payments of money specified in said contract promised and agreed to pay for all the materials and to furnish all tools, machinery and improvements and to do and perform all the work and labor in

the construction or improvement of certain bridges in Lewis and Clark County, State of Montana, in connection with and as a part of a certain public highway in said county known as the Augusta-Sun River Road said bridges being particularly described in said written contract as "1 concrete bridge and 5 treated timber pile trestle bridges and stock passes". That thereafter on or about the 25th day of September, 1934, the said defendants commenced the construction and improvement work in accordance with the terms and provisions of aforesaid contract; and, thereafter, up to and including the 1st day of February, 1935, were engaged in the performance of the construction and improvement work specified in said contract.

VI.

That on or about the 20th day of October, 1934, the said defendants rented certain equipment from E. H. Blakeslee consisting of an Ersted two drum hoist with tractor power to be used in connection with the performance of the construction and improvement work specified in the above mentioned contract and that on or about said 20th day of October, 1934, the said defendants and E. H. Blakeslee entered into a written agreement whereby the use of said equipment was rented to the defendants at an agreed rental rate of \$84.00 per month and the said defendants promised and agreed to return said equipment and unload and [45] deliver same to the said Blakeslee in the event the rental period of

such equipment should exceed thirty days. That thereafter on or about October 20th, 1934, the defendants took possession and used said equipment for a period of approximately fifty-two days in the performance of the construction and improvement work specified in said agreement with the State of Montana and, thereafter, to-wit, at a time known to defendants but unknown to plaintiff and between December 1, 1934, and December 11, 1934, the said defendants shipped said equipment to Great Falls, Montana, for the purpose of redelivering the same to aforesaid E. H. Blakeslee.

VII.

That on or about the 10th day of December, 1934, at approximately 10 o'clock P. M. the aforesaid E. O. Johnson and George S. Bardon left Augusta, Montana, traveling in the above mentioned automobile owned by E. O. Johnson with Great Falls, Montana, as their destination for the purpose of unloading and delivering to E. H. Blakeslee at Great Falls, Montana, in accordance with the terms of the aforesaid written agreement, the aforesaid equipment theretofore rented by the defendants from the said Blakeslee and at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls, Montana, while they unloaded and delivered aforesaid equipment and thereafter return to Augusta, Montana, the said Marguerite and her sister Roberta Doheny accompanied said E. O. Johnson and George S. Bardon

to Great Falls, Montana, in said automobile, arriving at Great Falls, [46] Montana, at approximately 11:55 P. M. on the day of December 10, 1934. That upon their arrival at Great Falls, Montana, the aforesaid equipment was unloaded and delivered by said defendants to E. H. Blakeslee by and through the assistance at the time of the said E. O. Johnson and George S. Bardon. That after said equipment was unloaded and delivered to the said E. H. Blakeslee the said E. O. Johnson and George S. Bardon, Roberta Doheny and Marguerite Doheny left Great Falls, Montana, in the above mentioned automobile with Augusta, Montana, as their return destination and by way of that public highway known as the Great Falls-Augusta road which is the main highway for public travel between Great Falls, Montana, and Augusta, Montana. That at all times from and after the said persons left Great Falls, Montana, up to and including the time the automobile in which they were riding left the public highway and collided with the tree as herein-after set forth the said George S. Bardon drove, operated and controlled the movements of said automobile under the direction of the said E. O. Johnson.

VIII.

That when said automobile with the occupants aforesaid arrived at a point within Cascade County, Montana, on said public highway where same has and takes its direction and course through the town of Simms, Montana, the said George S. Bardon,

while in the employ of the defendants as aforesaid and while under the direction of E. O. Johnson, drove and controlled said automobile in such a grossly negligent and reckless manner that said automobile while traveling at a speed of approximately between [47] fifty and sixty miles an hour was permitted by him to turn directly from and move off and from said public highway and crash into and collide with a large tree growing approximately twelve feet away from and to the side of said public highway in said Cascade County, Montana. That at the time and place on said highway when and where said automobile was permitted by the said George S. Bardon to leave said highway and collide with the tree aforesaid the said highway was approximately thirty feet wide in good and safe condition for travel by automobile and other means of conveyance and extended in an approximate straight line with a clear and unobstructed view for a distance of approximately one-half mile West and approximately one mile East from the place on said highway where the automobile driven at the time by aforesaid George S. Bardon was permitted by said George S. Bardon to leave the public highway and crash into the tree as aforesaid.

IX.

That by reason of said automobile being permitted by the said George S. Bardon and the said E. O. Johnson to move off of and away from the public highway and collide with and crash into the tree

as aforesaid the said Marguerite Doheny was thrown and hurled against the front seat and interior of the said automobile with great force and violence and her body was battered, bruised and cut and as a result thereof she suffered and sustained severe and serious bodily injuries and suffered great bodily pain and mental anguish and thereafter on or about the 12th day of December, 1934, as a result of the injuries sustained by her as [48] aforesaid Marguerite Doheny died all to her great damage in the sum of \$50,000.00. That as a result of the injuries sustained at the time and place aforesaid Marguerite Doheny was compelled to employ the services of a physician and obtain special hospital care and attention and become obligated for the payment of same to her further damage in the sum of \$50.00.

X.

That at the time of the grossly negligent and reckless operation of the automobile hereinabove referred to and the infliction of the injuries upon the said Marguerite Doheny, causing her death, said Marguerite Doheny was of the age of twenty years, in good health and was capable of earning and was earning the sum of approximately \$60.00 per month.

Wherefore, plaintiff prays judgment against the defendants in the sum of \$50,050.00 together with the costs and disbursements necessarily incurred in

and by reason of the within action and for such other and further relief as may be proper.

HALL & McCABE

Attorneys for Plaintiff. [49]

State of Montana

County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is a member of the law firm of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing complaint and that, as one of said attorneys for plaintiff, affiant makes this affidavit of verification for and on behalf of plaintiff for the reason that said plaintiff is absent from Cascade County, Montana, wherein her attorneys reside and maintain their office and where this affidavit of verification is made;

That affiant has read the foregoing complaint, knows the contents thereof and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 11th day of June, 1935.

[Notarial Seal] ETHEL M. ROBINSON,
Notary Public for the State of Montana, residing
at Great Falls, Montana.

My commission expires April 3, 1937.

[Endorsed]: Filed June 11, 1935 in state Court.

PLAINTIFF'S EXHIBIT 15.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
COVERDALE & JOHNSON, A CO-PART-
NERSHIP.

Comes now the defendant Coverdale & Johnson, a co-partnership, and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were, on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan auto-[51] mobile and that the same bore Montana License plates Number 13-1865 for the year 1934.

This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Marguerite Doheny and her sister Roberta Doheny [52] did accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934 in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson to permit or allow any person or persons and/or particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Marguerite Doheny and Roberta Doheny did so without the

consent, permission, invitation or authority of the defendant Coverdale & Johnson, and if the said Marguerite Doheny and Roberta Doheny did actually ride with the defendant E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile at said time and place, on the invitation or with the permission or consent of the defendant E. O. [53] Johnson, the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and said Roberta Doheny to ride with him in the said automobile at the said time and place.

In this connection this answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan at said time and place, with the defendant E. O. Johnson and George S. Bardon, on the invitation or with the permission or consent of George S. Bardon the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent or permission given unto him by this answering defendant Coverdale & Johnson and the said George S. Bardon was not then

and there acting as a servant or agent of the defendant Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason of the aforesaid the said Marguerite Doheny and Roberta Doheny in so riding in said Ford V8 Sedan automobile were not invitees or guests of the defendant Coverdale & Johnson and further alleges that the death of the said Marguerite Doheny, if result- [54] ing from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of this answering defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that it has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Marguerite Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that it has not sufficient information upon which to base a belief with re-

spect thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant prays that the plaintiff take nothing by her complaint and that it recover its costs herein expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for defendant,

Coverdale & Johnson. [55]

State of Montana

County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant Coverdale & Johnson in the above entitled action; that he makes this verification on behalf of said defendant, Coverdale & Johnson, a co-partnership, for the reason that none of the officers or agents of said co-partnership are within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires April 22, 1937.

State of Montana

County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant Coverdale & Johnson upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of Coverdale & Johnson.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires August 2, 1938. [57]

[Endorsed]: Filed Nov. 27, 1935 in state Court.
[56]

PLAINTIFF'S EXHIBIT 16.

[Title of State Court and Cause.]

SEPARATE ANSWER OF DEFENDANT
JOHN M. COVERDALE.

Comes now the defendant John M. Coverdale and in answer to plaintiff's complaint on file herein admits, denies and alleges as follows:

I.

Answering paragraph I of the complaint this answering defendant admits the allegations therein contained.

II.

Answering paragraph II of the complaint this answering defendant admits that the defendants John M. Coverdale and E. O. Johnson were, on the 11th day of December 1934, and for sometime prior thereto, had been co-partners doing business under the firm, name and style of Coverdale & Johnson. This answering defendant denies each, every and

all of the other allegations contained in said paragraph II.

III.

Answering paragraph III of the complaint this answering defendant admits that the defendant E. O. Johnson was on the 11th day of December 1934 the owner of a certain Ford V8 Sedan automobile and that the same bore Montana License plates Number [58] 13-1865 for the year 1934. This answering defendant denies each, every and all of the other allegations contained in said paragraph III.

IV.

Answering paragraph IV of the complaint this answering defendant admits that for a period of time prior to the 11th day of December 1934 one George S. Bardon was in the employ of the defendant partnership Coverdale & Johnson and directly connected with the performance by the defendant Coverdale & Johnson of that certain written contract theretofore entered into between said defendant and State of Montana through the Highway Commission, which contract is more particularly referred to in said complaint; this answering defendant denies that the said George S. Bardon was in the employ of defendant Coverdale & Johnson on the said 11th day of December 1934, or any time thereafter. This answering defendant denies each, every and all of the other allegations in said paragraph IV.

V.

Answering paragraphs V and VI of the complaint this answering defendant admits the allegations therein contained.

VI.

Answering paragraph VII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

In this connection this answering defendant alleges that if the said Marguerite Doheny and her sister Roberta Doheny [59] did accompany the said defendant E. O. Johnson and the said George S. Bardon from Augusta to Great Falls, Montana and return on the said 10th day of December 1934, in said automobile owned by the said defendant E. O. Johnson, the said defendant E. O. Johnson and the said George S. Bardon had not been instructed or directed, or granted permission or authority by the defendant John M. Coverdale or by the defendant partnership Coverdale & Johnson to invite, request, permit or allow any person and/or particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana and return. This answering defendant further alleges that the defendant E. O. Johnson and/or George S. Bardon did not have any right, authority, permission or allowance from the defendant John M. Coverdale

or the defendant partnership, Coverdale & Johnson to permit or allow any person or persons and/or particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at said time and place.

This answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson at said time and place, with the said defendant E. O. Johnson and George S. Bardon, the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, and if the said Marguerite Doheny and Roberta Doheny did actually ride with the defendant [60] E. O. Johnson and George S. Bardon in said Ford V8 Sedan automobile at said time and place, on the invitation or with the permission or consent of the defendant E. O. Johnson, the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and not in the transaction of the business of the defendant partnership Coverdale & Johnson and the said defendant E. O. Johnson was not then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and said Roberta Doheny to ride

with him in the said automobile at the said time and place.

In this connection this answering defendant further alleges that if the said Marguerite Doheny and Roberta Doheny did actually ride in said Ford V8 Sedan at said time and place, with the defendant E. O. Johnson and George S. Bardon, on the invitation or with the permission or consent of George S. Bardon the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent or permission given unto him by this answering defendant or by the defendant partnership Coverdale & Johnson and the said George S. Bardon was not then and there acting as a servant or agent of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson, or acting in the course of his employment in inviting, permitting or allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

This answering defendant further alleges that by reason [61] of the aforesaid the said Marguerite Doheny and Roberta Doheny in so riding in said Ford V-8 Sedan were not invitees or guests of the defendant John M. Coverdale or the defendant partnership Coverdale & Johnson and further alleges that the death of the said Marguerite Doheny, if resulting from injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts

or omissions of this answering defendant or of the defendant Coverdale & Johnson.

VII.

Answering paragraph VIII of the complaint this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the allegations therein contained.

VIII.

Answering paragraph IX of the complaint this answering defendant admits that Marguerite Doheny died on or about the 12th day of December 1934. Further answering paragraph IX this answering defendant alleges that he has not sufficient information upon which to base a belief with respect thereto and therefore denies each, every and all of the other allegations therein contained.

IX.

Further answering said complaint this answering defendant denies each, every and all of the allegations therein contained and not hereinbefore specifically admitted, qualified or denied.

Wherefore, having fully answered this answering defendant [62] prays that the plaintiff take nothing by her complaint and that he recover his costs herein expended.

HOWARD TOOLE

W. T. BOONE

Attorneys for defendant,
John M. Coverdale.

State of Montana
County of Missoula—ss.

W. T. Boone, being first duly sworn upon his oath, deposes and says: That he is one of the attorneys for the defendant, John M. Coverdale, in the above entitled action; that he makes this verification on behalf of said defendant John M. Coverdale, for the reason that said defendant is not now within Missoula County, Montana, where affiant resides. That he has read the foregoing answer and knows the contents thereof and that the same is true to the best of his knowledge, information and belief.

W. T. BOONE.

Subscribed and sworn to before me this 23rd day of November, 1935.

[Seal] JOHN E. PATTERSON,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires April 22, 1937. [63]

State of Montana
County of Missoula—ss.

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard

Toole and W. T. Boone appear as attorneys of record for the defendant John M. Coverdale in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 25th day of November, 1935, this affiant served a copy of the foregoing separate answer of defendant John M. Coverdale upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said separate answer of John M. Coverdale.

VALBORG MOE.

Subscribed and sworn to before me this 25th day of November, 1935.

[Seal] W. T. BOONE,
Notary Public for the State of Montana; residing
at Missoula, Montana.

My commission expires Aug. 2nd, 1938.

[Endorsed]: Filed Nov. 27, 1935 in state Court.

[64]

PLAINTIFF'S EXHIBIT 17.

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF
DEFENDANT JOHN M. COVERDALE.

For reply to the separate answer of defendant, John M. Coverdale, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and, denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson and defendant John M. Coverdale to permit or allow any person or persons and particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph VI of said answer.

Further replying to paragraph VI of said Answer plaintiff [65] denies that at the time of riding in said Ford V8 Sedan automobile belonging to defendant E. O. Johnson with the said defendant

E. O. Johnson and George S. Bardon the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that at the time and place said Marguerite Doheny and Roberta Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there acting in the scope of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O.

Johnson and George S. Bardon on the invitation and [66] with the permission and consent of said George S. Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto him by said defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson and defendant John M. Coverdale; and, denies that the death of said Marguerite Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of said answering defendant Coverdale & Johnson and defendant John M. Coverdale.

Wherefore, having fully replied to the answer of said defendant John M. Coverdale plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [67]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County, Montana where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 4th day of March, 1936.

[Seal] EDW. C. ALEXANDER,
Notary Public for the State of Montana. Residing
at Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed March 5, 1936 in state Court.

[68]

PLAINTIFF'S EXHIBIT 18.

[Title of State Court and Cause.]

REPLY TO SEPARATE ANSWER OF DEFENDANTS COVERDALE & JOHNSON, A CO-PARTNERSHIP.

For reply to the separate answer of defendant, Coverdale & Johnson, herein the plaintiff admits, denies and alleges as follows:

I.

Denies that the said defendant E. O. Johnson and George S. Bardon had not been instructed or directed or granted permission or authority by the defendant Coverdale & Johnson to invite, request, permit or allow any person and particularly the said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile belonging to the defendant E. O. Johnson on said trip from Augusta to Great Falls, Montana, and return; and, denies that the defendant E. O. Johnson and George S. Bardon did not have any right, authority, permission or allowance from the defendant Coverdale & Johnson to permit or allow any person or persons and particularly said Marguerite Doheny and Roberta Doheny to ride in said Ford V8 Sedan automobile at the time and place referred to in paragraph VI of said answer.

Further replying to paragraph VI of said answer plaintiff denies that at the time of riding in said Ford V8 Sedan automo- [69] bile belonging to defendant E. O. Johnson with the said defend-

ant E. O. Johnson and George S. Bardon the said Marguerite Doheny and Roberta Doheny did so without the consent, permission, invitation or authority of defendant Coverdale & Johnson; and, denies that at the time and place said Marguerite Doheny and Roberta Doheny rode in the said Ford V8 Sedan automobile on the invitation and with the permission and consent of the defendant E. O. Johnson that the said defendant E. O. Johnson was then and there acting on his own behalf and outside the scope of his authority given unto him by the defendant partnership Coverdale & Johnson; and, denies that such invitation, permission and consent was not in the transaction of the business of the defendant partnership Coverdale & Johnson; and, denies that the said defendant E. O. Johnson was not at the time then and there acting as a partner, servant or agent of the defendant partnership Coverdale & Johnson; and, denies that he was not then and there acting in the scope of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in the said automobile at the time and place mentioned.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan at the time and place mentioned with the defendant E. O. Johnson and George S. Bardon on the invitation and with the permission and consent of said George S.

Bardon that the said George S. Bardon was then and there acting in his own behalf and outside the scope of any authority, consent and permission given unto him by said defen- [70] dant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting as a servant and agent of the defendant Coverdale & Johnson; and, denies that the said George S. Bardon was not then and there acting in the course of his employment in inviting, permitting and allowing the said Marguerite Doheny and Roberta Doheny to ride with him in said Ford V8 Sedan automobile.

Further replying to said paragraph VI of defendant's answer plaintiff denies that at the time and place the said Marguerite Doheny and Roberta Doheny were riding in said Ford V8 Sedan automobile they were not invitees or guests of the defendant Coverdale & Johnson; and, denies that the death of said Marguerite Doheny resulting in injuries received while riding in said Ford V8 Sedan automobile was not the result of any negligence or the result of any of the acts or omissions of said answering defendant Coverdale & Johnson.

Wherefore, having fully replied to the answer of said defendant Coverdale & Johnson plaintiff prays judgment in accordance with her complaint herein.

HALL & McCABE

Attorneys for Plaintiff. [71]

State of Montana
County of Cascade—ss.

E. J. McCabe being first duly sworn upon his oath deposes and says:

That he is one of the members of the co-partnership of Hall & McCabe, attorneys for the plaintiff named in the within and foregoing reply and that as one of the attorneys for said plaintiff he makes this verification on behalf of said plaintiff for the reason that plaintiff is not within Cascade County, Montana where her attorneys reside and where this verification is made.

That affiant has read the foregoing reply, knows the contents thereof, and that same is true to the best knowledge, information and belief of affiant.

E. J. McCABE.

Subscribed and sworn to before me this 4th day of February, 1936.

[Seal] EDW. C. ALEXANDER,
Notary Public for the State of Montana, Residing
at Great Falls, Montana.

My commission expires Sept. 11, 1938.

[Endorsed]: Filed March 5, 1936 in state Court.

[72]

PLAINTIFF'S EXHIBIT 19.

[Title of State Court and Cause.]

State of Montana

County of Cascade—ss.

AFFIDAVIT OF SERVICE

Marie V. Dionne being first duly sworn upon her oath deposes and says:

That she is over the age of twenty-one years and is not interested in the above entitled action;

That Hall & McCabe appear as attorneys of record for the plaintiff in said action and have and maintain their office at Great Falls, Montana; and, that Messrs. Howard Toole and W. T. Boone appear as attorneys of record for the defendants Coverdale & Johnson, a co-partnership, and John M. Coverdale personally in said action and have and maintain their office in the Montana Building at Missoula, Montana;

That there is a regular and daily communication by United States mail between Great Falls, Montana, and Missoula, Montana;

That on the 5th day of March, 1936, this affiant at the request of the above named attorneys for the plaintiff served copies of the replies of plaintiff to the separate answers of defendants Coverdale & Johnson and defendant John M. Coverdale [73] upon the attorneys for said defendants by depositing in the United States post office at Great Falls, Montana, true and correct copies of said replies and each thereof in a sealed envelope with postage

prepaid thereon addressed to Messrs. Howard Toole and W. T. Boone, Attorneys at Law, Montana Building, Missoula, Montana for transmission and delivery to said attorneys for said defendants in regular course of mail.

MARIE V. DIONNE.

Subscribed and sworn to before me this 5th day of March, 1936.

[Seal] E. McCABE,
Notary Public for the State of Montana. Residing
at Great Falls, Montana.

My commission expires July 15, 1936.

[Endorsed]: Filed Mar. 5, 1936 in state Court.
[74]

PLAINTIFF'S EXHIBIT 20.

[Title of Court and Cause.]

VERDICT

We, the jury in the above entitled action, find in favor of the plaintiff, Ethel M. Doheny, as administratrix of the Estate of Marguerite Doheny, deceased, and against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, in the sum of \$5,000.00.

Dated this 2nd day of May, 1936.

CLARENCE W. WILSON,

Foreman.

[Endorsed]: Filed May 2, 1936 in state Court.

[75]

PLAINTIFF'S EXHIBIT 22.

[Title of State Court and Cause.]

NOTICE OF APPEAL

To: Ethel M. Doheny, Administratrix of the Estate of Marguerite Doheny, deceased, the plaintiff in the above entitled action, and to Messrs. Hall and McCabe, the plaintiff's attorneys and to each of you:

You and Each of You are hereby notified that John M. Coverdale, and Coverdale and Johnson, a co-partnership, defendants in the above entitled action, hereby appeal to the Supreme Court of the State of Montana, from that certain judgment made, given, returned, entered and filed in the above entitled action, in the District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, on the 4th day of May, 1936, as modified by that certain Order Taxing Costs and Disbursements, made, entered and filed in the above entitled action on the 15th day of May, 1936, which said judgment, as modified by said order is in favor of the plaintiff, Ethel M. Doheny, administratrix of the estate of Marguerite Doheny, deceased, and against the said defendants, John M. Coverdale and Coverdale and Johnson, co-partners, and is in the sum of five thousand (\$5,000.00) dollars, principal, and interest from the date of said judgment until paid, at the rate of six (6) percent, together with plaintiff's costs, taxed in the sum of one hundred sixteen and [76] 89/100 (\$116.89) dollars.

This appeal is from said judgment and from the whole thereof.

Dated this the 31st day of August, 1936.

HOWARD TOOLE

W. T. BOONE

Attorneys for John M. Coverdale and Coverdale and Johnson.

State of Montana

County of Missoula—ss:

Valborg Moe, being first duly sworn upon her oath deposes and says: that she is over the age of twenty-one years and is not interested in the above entitled action; that Hall & McCabe appear as attorneys of record for the plaintiff in said action, and have and maintain their office in the Strain Building at Great Falls, Montana; that Howard Toole and W. T. Boone appear as attorneys of record for the defendant Coverdale & Johnson in said action, and have and maintain their office in the Montana Building at Missoula, Montana. That there is a daily communication by mail between Missoula, Montana, and Great Falls, Montana; that on the 31st day of August, 1936, this affiant served a copy of the foregoing Notice of Appeal, upon the attorneys for the plaintiff by depositing in the United States postoffice at Missoula, Montana, in a sealed envelope with postage paid, addressed to Hall & McCabe, Attorneys at Law, Strain Building, Great Falls, Montana, a true copy of said Notice of Appeal.

VALBORG MOE.

Subscribed and sworn to before me this 31st day of August, 1936.

[Seal] W. T. BOONE,

Notary Public for the State of Montana; residing at Missoula, Montana.

My commission expires August 2nd, 1938. [78]

[Endorsed]: Filed Sept. 2, 1936 in state Court.

[77]

PLAINTIFF'S EXHIBIT 23

[Title of State Court and Cause.]

NOTICE OF FILING REMITTITUR

To the above named Defendants and to Messrs. Howard Toole and W. T. Boone, their Attorneys:

You, and Each of You, will please take notice that on June 5, 1937 Remittitur from the Supreme Court of the State of Montana affirming the judgment in the above entitled court and cause was filed in the above entitled Court.

Dated this 5th day of June, 1937.

E. J. McCABE

H. C. HALL

Attorneys for Plaintiff.

[Endorsed]: Filed June 17, 1937, in State Court.

[79]

PLAINTIFF'S EXHIBIT 24

[Title of State Court and Cause.]

EXECUTION WRIT

The State of Montana,

To the Sheriff of County of Deer Lodge, Greeting:

Whereas, on the 4th day of May, A. D. 1936 Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, deceased, recovered a Judgment in the said District Court of the Eighth Judicial District of the State of Montana, in and for the County of Cascade, against John M. Coverdale and E. O. Johnson co-partners doing business under the name and style of Coverdale & Johnson for the sum of Five Thousand and no/100 (\$5,000.00) Dollars damages with interest from May 4, 1936 at the rate of six per cent per annum until paid; together with her costs and disbursements at the date of said judgment, and accruing costs amounting to the sum of One Hundred Sixteen and 89/100 (\$116.89) Dollars as appears to us of Record.

And Whereas, the Judgment Roll, in the action in which said Judgment was entered, is filed in the Clerk's office of said Court, in the County of Cascade, and the said Judgment was docketed in said Clerk's office, in the said County, on the day and year first above written. And the sum of \$5,116.89 with interest from May 4, 1936, at the rate of six per cent per annum is now (at the date of this writ) actually due on said Judgment.

Now, you the said Sheriff, are hereby required to make the said sum due on the said Judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said Judgment, out of the personal property of the said debtors, or if sufficient personal property of said debtors cannot be found, then out of the real property in your county belonging to said debtors, on the day whereon said Judgment was docketed in the said County, or at any time thereafter, and make return of this Writ within sixty days after your receipt hereof, with what you have done endorsed thereon.

Witness: The Hon. C. F. Holt, Judge of the said Eighth Judicial District of the State of Montana, at the Court House in the County of Cascade, this 17th day of August A. D. 1937.

Attest: my hand and the seal of said Court, the day and year last above written.

[Seal]

GEORGE HARPER

Clerk

By H. J. SKINNER

Deputy Clerk

Sheriff's Office

County of Deer Lodge, Montana

I hereby certify that I received the within Execution on August, 1937, and after checking in the county assessor's office and inquiring about town I cannot find any property belonging to John M.

Coverdale personally or belonging to the copartnership of John M. Coverdale and E. O. Johnson.

Dated this 31st day of August, 1937.

BARNEY L. LARSEN,
Sheriff,
By JOE SCHULTZ.
Under Sheriff.

[Endorsed]: Filed Sept. 8, 1937 in State Court.

[80]

PLAINTIFF'S EXHIBIT 25

In the District Court of the Eighth Judicial District
of the State of Montana, in and for the County
of Cascade.—Department No. 1.

No. 26273

ETHEL M. DOHENY, Administratrix of the
Estate of Roberta Doheny,

Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON,
Co-partners doing business under the firm name
and style of COVERDALE & JOHNSON,
Defendants.

No. 26279

ETHEL M. DOHENY, Administratrix of the
Estate of Marguerite Doheny,

Plaintiff,

vs.

JOHN M. COVERDALE and E. O. JOHNSON,
Co-partners doing business under the firm name
and style of COVERDALE & JOHNSON,
Defendants.

BILL OF EXCEPTIONS

Appearances:

For Plaintiffs:

Mr. E. J. McCabe (of Messrs. Hall & Mc-
Cabe), .

Great Falls, Montana.

For Defendants:

Mr. Howard Toole and Mr. W. T. Boone,
Missoula, Montana.

Before Hon. W. H. Meigs, Judge. [82]

[Title of Court and Cause.]

The above-entitled actions came on for trial on Wednesday, April 29, 1936, before the Hon. W. H. Meigs, Judge, sitting with a jury, duly empaneled and sworn, Mr. E. J. McCabe (of the firm of Messrs. Hall & McCabe) appearing as counsel for the plaintiff in each of said causes, and Mr. Howard Toole and Mr. W. T. Boone appearing as counsel for the defendants in each of said causes. Whereupon the

following testimony was introduced and proceedings had.

Mr. McCabe: May the record show that it is stipulated between the parties that the two cases of Ethel M. Doheny as Administratrix of the Estate of Roberta Doheny and Ethel M. Doheny as Administratrix of the Estate of Marguerite Doheny versus John M. Coverdale and E. O. Johnson will be tried together with the consent of both parties.

The Court: Let the record so show, and in the empaneling of a jury that counsel will have double the number of challenges as they are two separate cases; they are simply being tried together because the same facts, same counsel, same parties, for convenience and saving of time.

Plaintiff's Case

JACK THOMPSON,

Sworn as a witness for and on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Jack Thompson. I reside in Great Falls and have resided here about twenty-two years. I am a photographer, and have been engaged in that occupation for about thirty years.

Q. On December 16, 1934, were you called upon to proceed to Simms, Montana, in Cascade County?

(Testimony of Jack Thompson.)

(Out of the hearing of the jury)

Mr. Toole: Now, if your Honor please, I will state to the Court before dictating the objection that the defendant Johnson has not been served in this action, the only two defendants being Coverdale and Johnson, and John M. Coverdale.

Now come the defendants John M. Coverdale and Coverdale & Johnson and object to the introduction of any evidence in this case upon the ground and for the reason that the complaint does not state a cause of action,

First, because it fails to allege that either of the said defendants were under any legal duty to protect the plaintiffs intestate, or that either of the defendants owed any legal duty to either of the Doheny girls; that the complaint further fails to allege that either of the defendants failed to perform any duty, any legal duty or other obligation, with respect to the Doheny girls; and that the complaint further fails to allege that the injury received by either of the Doheny girls was proximately caused by any breach of duty or any negligence or any delinquency of these defendants or either of them.

Second, the complaint fails to state a cause of action because it appears affirmatively from the face of the complaint that Marguerite Doheny and Roberta Doheny were riding in the automobile of E. O. Johnson at the time of the accident alleged in the complaint as the guests of E. O. Johnson and one George Bardon, and it appears affirmatively upon

(Testimony of Jack Thompson.)

the face of the complaint that George Bardon and E. O. Johnson, in permitting the two girls to ride as guests, were not then and there acting as agents or servants of the partnership or the defendant Coverdale, but were in fact acting solely upon a mission of their own and entirely outside of the scope of their authority and outside of the scope [85] of the business of the partnership.

Third, the complaint fails to state a cause of action because it fails to allege any facts upon which proof may rest of gross negligence and reckless operation; it fails to allege any duty owed to the Doheny girls with respect to the two defendants, or by the two defendants, in so far as the two girls were guests, under the Montana gross negligence act.

(Extended argument)

The Court: The motion will be denied.

A. I was.

(Witness continuing): I went down to Simms, Montana, that afternoon in company with you. In my business as photographer I am able to correctly portray by photograph, reproduce by photograph, the appearance of objects which I am called upon to take pictures of; and on that afternoon, or on December 16th, I took pictures of certain objects that were pointed out to me at that time. At that time I went to a garage or a place of storage in Simms, Montana, known as Malmgren's garage, where I saw an automobile, a Ford Sedan. There were no other automobiles in the garage at that

(Testimony of Jack Thompson.)
time. I am able to identify Plaintiff's proposed Exhibit No. 1, which you show me; it is a picture which was taken at that time in the Malmgren garage, and correctly or accurately sets forth the objects in that picture as they appeared at that time. Plaintiff's proposed Exhibits numbered 3, 4, 5, 6 and 7, I am able to identify; they are pictures which were taken by me at that time, and each of these exhibits correctly and accurately portrays and shows the appearance of the automobile appearing therein as it existed at that time. I am also able to identify Plaintiff's Exhibit No. 8, which is a picture I took on that afternoon. It is a picture of the public highway, looking east, [86] running through the town of Simms, known as the Great Falls-Augusta Highway, generally; it correctly and accurately portrays the condition of that highway as it existed and appeared at that time at the point where the picture was taken. The picture was taken approximately within the town of Simms. It shows the highway as extending east from the point where I took the picture. At that time my attention was called to a large poplar, or a large tree, to the side of the road, and the picture correctly portrays the poplar tree shown at that time. I have marked on that exhibit, at your request, by the word "Tree" the tree which was pointed out to me at that time. I later took a picture of that tree, which is Plaintiff's proposed Exhibit 11, which correctly portrays and shows the tree, the object

(Testimony of Jack Thompson.)

which it purports to represent, as it existed at that time. The tree shown in Exhibit 11, which I have indicated by the word "Tree" and "X" appearing on Plaintiff's Exhibit No. 8 is the same tree.

I am able to identify Exhibit No. 9 for Plaintiff as a picture taken at the same time, which represents another part of the same public highway running through the town of Simms, and shows the highway extending west. I have, at your request, on Exhibit No. 9, indicated by the word "Tree" the tree, which I examined at that time and which had some bark scarred on it at that time, and it is the same tree as appears on plaintiff's proposed Exhibit No. 11.

Exhibit No. 10 for Plaintiff is a picture that was taken at the same time, shows the highway looking west, and is a closer-up view of the tree involved in this matter. I have now indicated on Exhibit 10 by the word "Tree" and the letter "X" the tree in question, which is the same one as appearing in Plaintiff's proposed Exhibit No. 11. [87]

On each of these proposed exhibits, and on the back of them, appear the words "J. K. Thompson, 12/16/34," which I put on them so I could identify them.

(No cross examination)

(Witness excused)

R. J. WOODWARD,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is R. J. Woodward. I reside in Great Falls. I am a Civil Engineer in the employ of the State Highway Commission, and am at the present time employed by the State Highway Commission of the State of Montana. Have been so employed eight years.

I am acquainted with the public highway within the State of Montana known as the Great Falls-Augusta Public Highway, the one extending from Great Falls, Montana, to Augusta, Montana. That part of that road which extends from Sun River bridge at a point east of Simms, Montana, to Augusta, is also known and designated as the Augusta-Sun River road. The width of that public highway at the time it was first constructed was twenty-four feet from shoulder to shoulder, and by reason of use of that highway it has become considerably wider, so that on or about December 11, 1934, its width varied from about 27 feet up to about 32 feet, and where it goes through the town of Simms it was approximately 30 feet,—29 to 31 feet.

(No cross examination)

(Witness excused) [88]

Mr. McCabe: Now, if your Honor please, there have been two depositions that were taken of the witnesses Clair Garrity and E. Bernhardt, and we ask the Clerk to open them at this time so that they may be received in evidence.

May the record show that the stipulation appearing on each of the depositions of witnesses Clair Garrity and E. Bernhardt in the two cases on trial were signed by the respective attorneys for plaintiff and defendant.

The Court: The record may so show.

Mr. McCabe: The first deposition I am proceeding to read from is in the case of the Administratrix of the Roberta Doheny Estate.

The Deposition of Ed Bernhardt taken, pursuant to stipulation, before Jack Raftery, a Notary Public in and for the State of Montana, at his office in the County of Lewis and Clark on the 24th day of April, 1936, commencing at 10 o'clock A. M.

E. BERNHARDT

was called as a witness, pursuant to stipulation and, being sworn, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Ed Bernhardt; they all call me Ed, but I sign my name "E". I reside at 500 Leslie Avenue, Helena, Montana. During the months of November and December, 1934, I was residing

(Deposition of E. Bernhardt.)

at the Randall Hotel in Augusta. I am acquainted with John M. Coverdale, and am acquainted with Mr. E. C. Johnson, and was acquainted with those men in November and December, 1934. In November and December, 1934, I was employed by the firm of Coverdale and Johnson; I had a truck rented to them; I was hauling gravel; you could call it being hired by them to drive this truck; it was by the hour, the truck I was renting to them: they paid me by the hour for my own services and the use of my truck. I was employed by them only two months. I commenced my work around the 10th of November. My work was not continuous for two months [89] thereafter; what I mean by that: I would get caught up with my work and go back to Helena again; I did that two or three times, but a majority of the time I was employed by Coverdale and Johnson.

I was employed by Coverdale and Johnson on the 10th day of December, 1934, and at that time was employed by them in connection with transporting an Ersted, 2-drum hoist, with tractor power, between Augusta, Montana, and Great Falls, Montana. Mr. Johnson on that 10th day of December, 1934, told me to haul it to Great Falls; it was to be taken direct to Blakeslee's yard in Great Falls. He told me as soon as I got ready to leave to start with it for Great Falls. That was 4 o'clock in the afternoon when I loaded it. At that time he said he would meet me in Great Falls, and he told me he

(Deposition of E. Bernhardt.)

would help me unload it and show me where to take it. I wasn't acquainted in Great Falls. After he told me this, I loaded it; it took about an hour and a half to load the hoist; then I had dinner in Augusta after I had loaded it. Then I left with the hoist for Great Falls. This hoist was not mounted on an automobile truck, it was just a Fordson Tractor, and the only thing I had to do with it was haul it to Great Falls. I drove the conveyance that transported the hoist.

I saw Mr. Johnson that evening in Great Falls, Montana, I imagine it was 10:30. At that time I wasn't acquainted with Roberta Doheny; I knew her by sight, knew who she was. I was acquainted with Marguerite Doheny at that time.

Q. Did you see either Marguerite Doheny or Roberta Doheny with Mr. Johnson in Great Falls?

Mr. Toole: That is objected to as irrelevant and immaterial.

The Court: Overruled.

A. Yes. [90]

Witness: With Mr. Johnson, when I saw him, were George Bardon, Harry Ballard—not Harry, but his last name was Ballard—and Herb Jenson.

Q. When you saw Mr. Johnson and Mr. Bardon, the two girls and these other two men, where were they with respect to Mr. Johnson's Ford automobile?

Mr. Toole: May we have the same objection, so far as the two Doheny girls are concerned, with respect to the Coverdale partnership?

(Deposition of E. Bernhardt.)

The Court: If there is nothing new, yes; if there is anything special I would like to have it called to my attention.

Mr. Toole: Very well.

A. They were in the Mint at a table.

Witness: After I saw Mr. Johnson I did not immediately leave, we sat there and drank one glass of beer and then left. When I left I saw Mr. Johnson, both the Doheny girls, Mr. Bardon and Jenson and Ballard in the automobile. After I left the Mint I went down to Blakeslee's yard in Great Falls; I followed Mr. Johnson and these other persons down there, all of whom were in the car during all of the period of time from the time I left the Mint until I arrived at Blakeslee's yard. George Bardon was driving the automobile at that time.

Q. Prior to this time, did you know whether Mr. Bardon was in the employ of Coverdale and Johnson?

Mr. Toole: Objected to as immaterial.

The Court: He asks if he knows; overruled.

A. Yes, sir, he was.

Witness: I saw him do work around the contract work on the highway in which Coverdale and Johnson were engaged. He was [91] timekeeper. Mr. Coverdale or Mr. Johnson were present at times when I was present, in which Mr. Bardon was keeping time.

(Deposition of E. Bernhardt.)

When we arrived at the Blakeslee yard we unloaded the hoist after looking about a half an hour to find a place to put it. Mr. Johnson, Mr. Ballard and Mr. Jenson helped me to actually unload the hoist. During this time Bardon and the two girls were sitting in the car. Mr. Bardon turned the car around to shine the lights on us so we would have light to see where we were unloading the hoist. He did that at the direction of Mr. Johnson. It took us, I would say, very close to an hour to unload the hoist. I imagine that it was 10:30 that I first saw Mr. Johnson on that evening at the Mint, after I arrived in Great Falls.

I was acquainted with the location of the work being done under the highway contract by Coverdale and Johnson on the Augusta-Sun River road. The work consisted of wooden piling overpasses and one concrete bridge. As to the work being all around one place on the highway or scattered different places, it was scattered all over, on the Great Falls road for a distance of ten miles, and on the Choteau road I imagine 5 miles. I did not remain in the employ of Coverdale and Johnson until they completed the work under this contract; they were still working when I terminated my employment. Prior to the 10th day of December, 1934, Mr. Coverdale had been present in connection with the work, and Mr. Johnson had been present in connection with it.

(Deposition of E. Bernhardt.)

Q. Did you hear Mr. Johnson or Mr. Coverdale instruct the men in their employ, men on the work, working at the time, as to the performing of any of the work?

Mr. Toole: Objected to as immaterial, not tending [92] to prove any issue in the case.

The Court: I cannot determine yet; it might.

Mr. McCabe: The only purpose is to show that both men were present working on the job, giving directions.

Mr. Toole: Objected to because it does not fix the time; it is immaterial; too remote; does not prove any issue in this case, and because nothing stated by Coverdale at that time and place to have any bearing on the issues in the case.

The Court: Overruled, because the young man says he was only working there about two months and, if it is not germane, later you can make motion to **strike**.

A. Yes.

Witness: Prior to the 10th day of December Mr. Coverdale went away and left the work, and Mr. Johnson remained in custody, present on the work. I was acquainted with Mr. Coverdale's Plymouth Sedan automobile, and was acquainted with Mr. Johnson's automobile, a 1934 V-8 Ford Sedan.

Q. Do you know whether those automobiles were used for or by Mr. Coverdale and Johnson in connection with the work under the highway contract?

(Deposition of E. Bernhardt.)

Mr. Toole: That is objected to because it is immaterial, does not tend to prove or disprove any of the issues in this case, it being immaterial as to what purposes Johnson's and Coverdale's automobiles were used for in connection with the work, it being of course defendants' contention that that does not entitle the Doheny girls to ride in Johnson's automobile and does not bind the defendants Coverdale and the partnership.

The Court: One of the instrumentalities used by [93] the partnership in going to the place where some equipment would be unloaded. It will be overruled.

A. Yes.

Q. And did you see Mr. Johnson and Mr. Coverdale drive those automobiles during the period of time of this employment by Coverdale and Johnson?

Mr. Toole: Same objection.

The Court: Overruled.

A. Yes, sir.

Q. What did you see, during that time, Mr. Coverdale and Mr. Johnson do, with reference to driving those automobiles?

Mr. Toole: We make the same objection to that as made to the previous question, particularly with reference to the automobile of Coverdale; it is not involved at all.

(Deposition of E. Bernhardt.)

The Court: The automobile of Mr. Coverdale is not involved, no, and it ought to be limited to Mr. Johnson's car, I think.

Mr. McCabe: I don't like to make this statement in the presence of the jury, but I would like to state the purpose.

The Court: No, if it is in the matter of evidence, but it would seem now that if Mr. Coverdale had a car that he was using in his work and didn't hurt anybody, that we wouldn't be concerned with it. The only feature of it—well, I think that that is far enough. Unless something is connected up now, I will sustain the objection with reference to Coverdale's car.

Mr. McCabe: Then the answer refers to that in the plural. [94]

The Court: Can't you by agreement make it singular?

Mr. McCabe: I don't think we can.

The Court: Let me see it.

Mr. McCabe: I think I should be permitted to state the purpose of it; it becomes very material.

The Court: Sustain the objection.

Mr. McCabe: But with leave later on—

The Court: Yes, naturally, but I think that whole page will have to be sustained.

Mr. McCabe: Then I think we can shorten this by stating the purpose of it in the absence of the jury, because it absolutely ties me up unless I can state my purpose to the Court.

(Deposition of E. Bernhardt.)

The Court: Let me look at it further on . . .
I will have to sustain the objection.

Mr. McCabe: May I ask leave of the Court
to later state the purpose?

The Court: Yes.

Q. During that period of time, from the time you first went to Augusta in the employ of Coverdale and Johnson until a time approximately two months later when you left their employ, did you ever see any other persons riding in Mr. Coverdale's car or automobile, being at the time driven by Mr. Coverdale, on the road or highway which extends from Augusta, Montana, to Great Falls, Montana?

The Court: I would think, Mr. McCabe, if I may interrupt, that the objection is going to be to all the balance of this clear down to cross-examination. You might read the question; I think the objection would [95] have to be sustained. It might be that it would be better not to read at this time, unless you wish.

Mr. McCabe: Then we get to the question of Mr. Johnson's automobile:

Q. Did you ever, during that period of time, see persons other than persons in the employ of Coverdale and Johnson being transported in Mr. Johnson's automobile on the same highway at the time Mr. Johnson was driving his automobile?

(Deposition of E. Bernhardt.)

Mr. Toole: That is objected to as being immaterial, there being nothing about the evidence which would tend to prove any of the issues in this case, it being immaterial as to whether or not Johnson hauled other people from time to time.

The Court: It may be attempting to show a habit on his part of hauling people.

Mr. Toole: May I have objection also that the rides were given in the course of the partnership business,—being incompetent to prove that any rides were given in the course of partnership business.

The Court: That is what it says, in his operating his business, immediately before. I think you can answer with reference to Mr. Johnson.

A. Yes.

Q. And how many times would you say you saw such persons being driven in Mr. Johnson's automobile?

Mr. Toole: Same objection.

The Court: Same ruling.

A. I would say, in Mr. Johnson's car, nearly every day.

Q. During that same period of time did you ever see persons, other than persons in the employ of Coverdale and Johnson, being [96] transported in

(Deposition of E. Bernhardt.)

an automobile in which Mr. Coverdale or Mr. Johnson were present?

Mr. Toole: Objected to on the ground it is immaterial.

The Court: That brings the knowledge home to the partnership. Overrule the objection.

A. Yes.

Q. In whose automobile was it that you saw such persons being transported?

Mr. Toole: Same objection.

The Court: Same ruling.

A. Mr. Johnson's.

Cross Examination

By Mr. Boone.

Witness: I owned the truck, which I rented to Coverdale and Johnson. In connection with my duties I was hauling gravel or piling and guard rails. On December 10, 1934, I was not on the construction work all that day; I arrived on the job about 4:30 in the afternoon. The hoist which I later took to Great Falls was not then in operation, not when I arrived. They had finished using that hoist sometime that afternoon, but I couldn't say what time it was; I know that it was sometime in the afternoon, and I would say early in the afternoon, but I don't know what time it was. I did not know where Blakeslee's yard was in Great Falls. I had been to Great Falls before.

(Deposition of E. Bernhardt.)

I assisted with the unloading of the hoist. It was necessary that others help me unload it.

I have related that Mr. Bardon was present in Great Falls when the hoist was unloaded. In the course of my employment with Coverdale and Johnson, I had occasion to observe the hours [97] worked by Mr. Bardon as timekeeper. He didn't have any regular hours; I lived in the same room with Mr. Bardon and some evenings when he was behind with his work he worked up until 1 or 2 o'clock in the morning. The work that he was doing was on the job as timekeeper. Once in a while he would haul something to the depot or when we needed something he would do it. On December 10, 1934, he was timekeeper. I don't know on that particular day when he went to work; I don't know whether he went out on day shift or whether it was in the afternoon. In December the afternoon shift was in force; there was a morning shift also. As to whether Mr. Bardon was on the morning shift or the afternoon shift, Mr. Bardon didn't have any shift; I couldn't say; he worked all of the time; there was no thirty hours connected with the timekeeper. I observed him as timekeeper checking time on the job of the other employees; that was his duty.

When I arrived at the Blakeslee Yard in Great Falls to unload the hoist, Mr. Bardon stayed in the car, and Marguerite and Roberta Doheny also stayed in the car at that time. Mr. Bardon didn't

(Deposition of E. Bernhardt.)

get out of the car at all at the Blakeslee yard, and offered no assistance whatever in unloading the hoist outside of turning the lights on, but he never got out of the car nor handled any part of the hoist itself.

I don't know of my own knowledge who invited Marguerite Doheny and Roberta Doheny to ride to Great Falls on that particular occasion, and do not know when the invitation was extended or made to the girls. Marguerite and Roberta Doheny did not assist in unloading the hoist, nor take any part in connection with the work, nor have any relation to that work. When I came out of the Mint I saw Mr. Johnson, Mr. Bardon and the two Doheny girls get into the Johnson car. I couldn't say the positions [98] taken by the parties in the car, or whether Marguerite was in the front seat or back seat. The car in which Mr. Bardon, Mr. Johnson and the two Doheny girls were riding in Great Falls was owned by Mr. Johnson, that is, to my knowledge.

Redirect Examination

By Mr. McCabe.

Witness: As to the other duties that Mr. Bardon performed besides that of timekeeper, well, if anything arrived at the depot, George would get it, any parts to be ordered and on two or three different occasions he helped me load guard rail posts when we were short of help. I have heard Mr.

(Deposition of E. Bernhardt.)

Johnson make requests to Mr. Bardon on other occasions to do work other than that of timekeeper; he asked him to help me unload guard rails, guard rail posts.

Q. During the times in which you saw Mr. Bardon employed by Coverdale and Johnson as timekeeper on this job, did you ever see him drive Mr. Coverdale's car back and forth?

Mr. Toole: Objected to as immaterial; same objection as made to the first question.

The Court: Overrule the objection. Apparently in addition to being timekeeper you might call him a general utility man.

A. Yes.

Q. At the time he was driving the car, do you know what the purpose was, what kind of work he was doing, if any, in connection with the driving of the car?

Mr. Toole: Objected to for the same reason.

The Court: Overruled.

A. Yes, sir.

Q. What was it?

A. In the evenings on different occasions he took one fireman [99] to the bridge to keep the fire under the bridge; it was cold and they had just poured the cement.

Q. In taking that man to the bridge, did you see Mr. Bardon drive the automobile? A. Yes.

(Deposition of E. Bernhardt.)

Q. Whose automobile was it?

Mr. Toole: That is objected to as immaterial.

The Court: Overrule the objection.

A. He used Mr. Coverdale's and Mr. Johnson's car, both, at different times.

Q. Did you ever see Mr. Bardon driving their automobiles in which persons were being transported between Augusta and the work?

Mr. Toole: Same objection.

The Court: Overruled.

A. Yes.

Q. Approximately how many times did you see him driving an automobile in transporting such persons?

Mr. Toole: That is objected to as immaterial.

The Court: Overruled.

A. I would say three or four times a week.

Q. Did that extend over the period of time which you worked there? And when I say "when you worked there," I mean when you were employed by Coverdale and Johnson.

A. Yes.

Recross Examination

By Mr. Boone.

Witness: I have stated that on occasions Mr. Bardon, in addition to his duties as timekeeper, transported certain boards to the job and also

(Deposition of E. Bernhardt.)

helped me unload boards and equipment. However, those chores or duties never took him out of Augusta other [100] than from Augusta to the job. In other words, I would say that his work was confined to the territory at Augusta, from Augusta to the job.

Mr. McCabe: Then a motion was made by Mr. Boone; I don't know whether they want to renew it at this time or not.

Mr. Toole: Yes, I want to make that motion. Now comes the defendant John M. Coverdale, individually, and the defendants Coverdale and Johnson, partnership, and move to strike out that portion of the testimony given by the witness, which relates to the transportation of people by the defendant Coverdale.

The Court: It has not been admitted yet.

Mr. Toole: All the last part with reference to Coverdale's car, that was with reference.

The Court: That is all right then, to strike that, if there is any reference to Mr. Coverdale.

Mr. Toole: Now I move to strike all that portion of the evidence of this witness with respect to transportation of people by George F. Bardon in the automobile owned by Coverdale, on the ground it is irrelevant and immaterial, does not tend to prove any issues in this case.

(Deposition of E. Bernhardt.)

The Court: Overruled; it shows employment—for the consideration of the jury—by the partnership.

Mr. McCabe: May the record show that the substance of this deposition will also be deemed to have been read in the Marguerite Doheny estate case as to the defendants Coverdale and Johnson.

The Court: Yes. [101]

(Jury admonished and excused until 9:30 a. m., April 30, 1936.)

Mr. McCabe: Now, if your Honor please, the purpose of the testimony set forth in the deposition, and the objections to which concerning questions were sustained, is to show that in addition to the Johnson car being used for the purpose of transporting not only laborers and persons employed on the work, that the Coverdale car likewise was employed while they were performing the work in transporting also persons, that those persons not only constituted men in the employ, but persons living along the road and other persons that had no connection with the employment, and that this was a constant practice, both Mr. Coverdale and Mr. Johnson were doing this, and the evidence further shows that on two different occasions this transportation of passengers by Mr. Coverdale and Mr. Johnson was done while Mr. Coverdale, in one case, was in Mr. Johnson's car

when he was transporting these passengers and these strangers, as well as men who were on the job, and another occasion when Mr. Johnson was in Mr. Coverdale's car transporting, and that this practice extended over such a period of time that Mr. Coverdale knew or, in the exercise of ordinary care or ordinary enquiry, should have known, he being on the job, the purpose for which both instrumentalities were being used, he knew his own was being used for this purpose in connection with the partnership work, and he knew on one occasion Mr. Johnson was using his car for that purpose, and this was extending over such a period of time which brings it within the rule which states that where it is shown by the evidence that the cars were used for the purpose of transporting passengers for a period of time that the inference may be drawn, and both partners knew of it and acquiesced and consented to it, and thereby extended, impliedly at least, the [102] ostensible powers of each party and authorities.—66 Fed. (2d) 678.

The Court: Objection is that the mere fact Coverdale transported persons in his automobile is no reason or excuse or authority for Johnson doing the same thing,—that is the sum and substance?

Mr. Toole: Yes.

Mr. McCabe: Yes, your Honor. But the purpose of this testimony is to show that both of them had knowledge of each of the other's trans-

porting passengers with the cars of the business.

The Court: That is exactly what I wanted the authority on, that question.

Mr. Toole: Section 7997, 7998, subdivision 7.

The Court: The Court will stand adjourned until tomorrow morning at 9:30.

Thursday, April 30, 1936, 9:30 A. M.

The Court: Have you gentlemen any other cases or do you wish the jury to retire during the ruling on this question?

Mr. Toole: No, not as far as I am concerned.

Mr. McCabe: No, I don't think it will be necessary for them to retire during the ruling.

The Court: The question was the knowledge or the acts of Mr. Coverdale with reference to hauling people in his car. The objection to that will be sustained as to what he did himself.

As to whether he did or not have knowledge of Mr. Johnson can be shown. The principle is somewhat like "Bobby did this and I have a right to do it too." It is not what Coverdale did but what Johnson did; but if Coverdale knew what Mr. Johnson [103] was doing, that can be shown, in addition to whether he knew it or not, if it was done within the scope of the partnership. Of course, all these things are going to come up later again and will likely be considered again.

Mr. McCabe: Now, if your Honor please, we

desire at this time now to have entered into the record the deposition of Clair Garrity.

The deposition of Clair Garrity taken, pursuant to stipulation, before Jack Raftery, a Notary Public in and for the State of Montana, at his office in the County of Lewis and Clark, on the 24th day of April, 1936.

CLAIR GARRITY

called as a witness, pursuant to stipulation, and being duly sworn testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Clair Garrity. I reside at 100 North Rodney Street, Helena, Montana. In the early part of December, prior to the 11th of December, I was residing at the Randall Hotel at Augusta, and had resided there approximately between four and five months prior to that time. In December, 1934, I was acquainted with John M. Coverdale, and at that time I was acquainted with Mr. E. O. Johnson. Mr. Coverdale and Mr. Johnson, to whom I refer, were operating in connection with a certain road or highway contract up there under the name of Coverdale and Johnson. I was not employed by Coverdale and Johnson. I was not employed at any time during the month of December, 1934, by John M. Coverdale, nor by Mr. E. O. Johnson. On the 10th of De-

(Deposition of Clair Garrity.)

ember, 1934, I had a conversation with Mr. Johnson, of the firm of Coverdale and Johnson, relative to going to Great Falls, Montana. [104]

Q. What was that conversation?

Mr. Toole: That is objected to now for the reason that those statements of Mr. Johnson, in so far as these two Doheny girls are concerned, with respect to the trip to Great Falls, would not be binding upon the partnership nor upon Mr. Coverdale.

The Court: I presume it is connected up, Mr. McCabe?

Mr. McCabe: I think the next question eliminates the objection.

Q. Did you see Oscar Johnson at Augusta, Montana, on the 10th of December, 1934?

A. I am not exactly sure of the dates.

Q. Well, to refresh your recollection: In the early part of December, did you learn of a collision of a car which belonged to Mr. Johnson, on the Augusta-Great Falls highway in which persons were injured?

A. Yes, I heard about the accident.

Q. With respect to the time you heard this about this accident, or with respect to the day you heard it, what was the day on which you had a conversation with Mr. Johnson relative to going to Great Falls?

(Deposition of Clair Garrity.)

A. It was the night before I heard of this accident that I talked to Mr. Johnson.

Q. What did Mr. Johnson say to you at that time?

Mr. Toole: Now, the objection I stated a moment ago is made to this question.

Mr. McCabe: The answer was not given.

Q. Well, Mr. Garrity, at that time what did you say to Mr. Johnson?

Mr. Toole: That is objected to for the same reason; [105] no statements by Mr. Garrity would be binding under any circumstances about the partnership.

The Court: No, but if it is about partnership business——

Mr. McCabe: I think it is all connected up; I couldn't cover it in one question.

The Court: No, you could not, and I will have to take your statement in connection with that, with motion to strike if not proper.

A. I asked Mr. Johnson if I could ride to Great Falls with him.

Q. And what did he say to you at that time?

Mr. Toole: That is objected to for the same reason; and I move to strike the answer previously made to the previous question on the ground and for the reason that no statements made by Mr. Garrity could in any respect bind the partnership nor Mr. Coverdale, nor could

(Deposition of Clair Garrity.)

any conduct on his part bind the partnership or Mr. Coverdale.

The Court: Well, it all depends whether it was on partnership business or not. It may come up later, and you will make your notations to present a motion to strike, if you wish.

A. He told me that he was going to Great Falls that night and that I could go with him in his car.

Q. What did he say was his purpose in going to Great Falls?

Mr. Toole: That is objected to upon the ground and for the reason that so far as these plaintiffs are concerned and plaintiffs intestate, no statement by Mr. Johnson could be binding on Mr. Coverdale or on the [106] partnership.

The Court: Objection overruled.

A. Mr. Johnson told me that he had a driver ahead of him on the road, hauling a hoist to Great Falls; that the driver wasn't acquainted in Great Falls and that he was going in to show him where this hoist should be unloaded.

Witness: I had been acquainted with Mr. Coverdale and Mr. Johnson, prior to the 10th day of December, 1934, approximately the same length of time I resided at the Randall Hotel; that is where I first met them; I think it was between four and five months. I was acquainted with the automobile that was operated or owned by Mr. Johnson. I am not acquainted with the time when Coverdale

(Deposition of Clair Garrity.)

and Johnson began operations or work in connection with the highway contract which I said they worked on, the Augusta-Sun River highway; they started work before I got there, and prior to my arrival they were working on this state highway project.

Q. Now, had Mr. Johnson, during that period of time in which Coverdale and Johnson were employed on this highway contract, concerning which you have testified, ever transported you in his car or his automobile on that road, to points on that road, which extends between Augusta, Montana, and Great Falls, Montana?

Mr. Toole: Objected to because it is immaterial as to whether Johnson hauled this man Garrity or anyone else on that road, not being shown that the Doheny girls were along at that time; and it is further objected to for the reason that the conduct of Mr. Johnson in hauling Mr. Garrity outside of the presence of Mr. Coverdale would not be binding upon Mr. Coverdale, and could not be binding upon the partnership; and it is further objected to because it is not shown that he was hauling [107] Mr. Garrity in any matter in connection within the partnership business or within the scope of his own authority.

The Court: The objection will be overruled because it has a bearing on the question as to whether the transportation and the invitation

(Deposition of Clair Garrity.)

to the Doheny girls was not an accident or a mistake on the part of Johnson; similar acts would be admissible for that purpose.

A. Yes, I have ridden with Mr. Johnson.

Q. How many times would you say Mr. Johnson had ridden you or driven you in his automobile, as you have testified to, during that period of time?

Mr. Toole: Same objection: I call to your Honor's attention that it does not say between Great Falls and Augusta.

The Court: The previous question did.

Mr. McCabe: Different points on that road where they were working.

The Court: The first question, as I understood, called attention to that fact, along where they were working, and this is following up right at the same time.

Mr. McCabe: This is following the same thing.

The Court: He may answer.

A. I have ridden numerous times with Mr. Johnson, but I couldn't state how many; it has been considerable.

Q. Could you say approximately the total number of times?

A. Oh, I would say probably 20 or more.

Q. Mr. Garrity, on any of these occasions on which you rode with Mr. Coverdale, was Mr. Johnson present in the car?

(Deposition of Clair Garrity.)

Mr. Toole: Objected to for the reasons stated. [108]

The Court: Overruled.

A. Yes.

Q. And when you were riding with Mr. Johnson, as you have testified, in his automobile, was Mr. Coverdale any time in the car?

Mr. Toole: Same objection.

The Court: Overruled.

A. Not to my recollection.

Q. Now, Mr. Garrity, during this same period of time in which Coverdale and Johnson were operating and handling the work of their highway contract, concerning which you have testified, did you ever see other persons transported in the automobile of either Mr. Coverdale or Mr. Johnson?

Mr. Toole: That is objected to upon the ground and for the reason that it is immaterial as to whether or not Mr. Coverdale in his automobile ever transported any other person, because it is not shown as to who the other persons may have been, it is not shown as to whether or not they were employees of the partnership or men engaged in work on the job; that it is immaterial because the hauling of other persons would not serve in any manner to demonstrate the authority of Johnson or Bardon to pick up the two Doheny girls, that is, as to Coverdale.

(Deposition of Clair Garrity.)

The Court: Sustain that as to Mr. Coverdale.

Mr. Toole: Now, it is objected to as to Mr. Johnson because it is immaterial, does not tend to prove any issue in this case, because the hauling of other persons by Mr. Johnson does not tend to prove that he had authority or right or permission from the partnership or from Mr. Coverdale to haul the Doheny girls in his car. It is [109] further objected to because the persons indicated in the question are not named; it is not shown whether they were employees of the partnership or of Johnson, and the time is not named, remote, and does not tend to show or indicate any grant of authority by the partnership or by Coverdale to Johnson or to Bardon to pick up the two Doheny girls.

The Court: The question is subject to answer Yes or No, and again it shows as to whether Johnson was acting under accident or mistake; it is therefore overruled until it is.

Mr. McCabe: The next answer, he doesn't say Yes; it reads:

A. I used to see passengers in their cars right along; they transported help back and forth to the project many times.

Mr. Toole: I move that the answer be stricken, and counsel be asked to refrain from reading——

(Deposition of Clair Garrity.)

The Court: Yes, that will be passed. Gentlemen of the Jury, you will disregard having heard that answer. The objection will be sustained to that.

Mr. McCabe: These are all the same line and we will just skip them.

The Court: Very well.

Witness: Johnson's car was a Ford V-8. On the evening of December 10, 1934, shortly before 8 o'clock in the evening, I saw Mr. Johnson, Marguerite Doheny, Roberta Doheny and George Bardon in the Johnson automobile; they were inside of the car at the time. The car was standing still when I seen it last; I went upstairs in the hotel and Mr. Johnson was sitting behind the wheel the last I seen of it; he was sitting in the driver's seat. There were [110] two other men but I don't know their names; they were in Augusta a short time, having been laid off that night.

Q. At that time did Mr. Johnson say anything to you about going to Great Falls?

Mr. Toole: Objected to as calling for hearsay, the defendant Johnson never having been served in this action and not being a party to the action, and any statements made by him would not be binding upon the partnership in so far as they bear upon the matter of picking up the two Doheny girls to give them a ride to Great Falls.

(Deposition of Clair Garrity.)

The Court: That question may come up later, one party who is responsible for the other, and it will be overruled.

A. Mr. Johnson asked me if I was ready to go, that he was leaving for Great Falls and that they were ready to go at that particular time.

Witness: This conversation I had, the last conversation I had with Mr. Johnson, was in the lobby of the hotel; the others were in the car ready to leave. When Mr. Johnson was at the wheel of the car, that was after he talked to me; he went out and got into the car immediately after; I saw him get into the car. I did not see him drive away. The automobile in which I saw Mr. Johnson seated in behind the driver's wheel that evening that I had this conversation with him was a Ford Sedan, V-8 automobile. It was the car that Mr. Johnson claimed as his car.

Cross Examination

By Mr. Boone:

Witness: I was not employed by either Mr. Coverdale or Mr. Johnson nor by the partnership of Coverdale and Johnson. I [111] worked on the Tomlinson-Arkwright road project. The conversation which I had with Mr. Johnson on the day prior to the accident started at the dinner table, I would say approximately 6:30 or 7 o'clock, between 6 and 7. He didn't say when he had arranged the trip for Great Falls but he told me he was intending to leave immediately after dinner and that if I cared to go with him I could; however, I didn't go with

(Deposition of Clair Garrity.)

him, because I decided that the car was overloaded as it was, without me; there were already six people in the car.

I have related that on numerous occasions I have ridden with Mr. Johnson, and the car in which I had ridden with him was, to the best of my knowledge, owned by him; as far as I know, it was owned by Mr. Johnson. It was the same V-8 Ford involved in this case. I couldn't say the dates of those occasions when I rode with him. They had small bridge structures right along this project I was working on and at different times in going out to them Mr. Johnson would let me ride as far as I was going, where I was working. The occasions when I rode with Mr. Johnson were when he was taking me to my work. I was not employed by Coverdale and Johnson, nor by Mr. Johnson nor by Mr. Coverdale, and the work which I was performing wasn't being done by Coverdale and Johnson. Neither Mr. Coverdale nor Mr. Johnson had anything to do with the work that I was performing. I was employed building concrete culverts and cattle passes and in some parts of the work being performed by Coverdale and Johnson they were working within, I would say, 100 yards of where I was working; some days they were working altogether on the other end of the project.

Mr. Coverdale and Mr. Johnson stayed at the same hotel where I resided, and on the occasions when I rode with Mr. Johnson [112] he invited me to do so, simply to take me to work, and the rides

(Deposition of Clair Garrity.)

were in the car owned individually by Mr. Johnson, as far as I know.

Mr. Johnson and Mr. Coverdale on numerous occasions transported their own men from the hotel to the work; it is a considerable distance from the hotel to the bridge projects. Those were the men actually working for Coverdale and Johnson. I also stated I seen, numerous times, had seen men in their cars that weren't employed by them; those men were employees of the Tomlinson-Arkwright Company, and were men in the same position I was exactly.

Mr. Toole: I move that the entire testimony of Mr. Clair Garrity be stricken from the record upon the ground and for the reason that it does not tend to show in any respect any condition from which any inference may be drawn that it was the custom of either the partnership or Mr. Coverdale to haul guests; the evidence discloses that all persons referred to in Mr. Garrity's evidence were employees of Coverdale and Johnson or employees of Tomlinson and Arkwright; further shows that the Tomlinson and Arkwright contract, their work, was concurrent with the same place as Coverdale and Johnson, and the hauling of employees back and forth from the job does not tend to prove either as to Coverdale and Johnson or as to Coverdale that any permission or right or authority was given to haul the two Doheny girls

(Deposition of Clair Garrity.)

as guests on the night of December 10, and it does not tend to prove that when Mr. Bardon and Mr. Johnson picked up the two Doheny girls that they were engaged in the scope of the business of the partnership. [113]

The Court: The motion will be denied. You don't offer to show in the examination of Garrity if Tomlinson & Arkwright and Johnson & Coverdale were connected in any manner, doesn't show, and therefore, as far as they are concerned, they are in the same position as Garrity. Motion will be denied.

Mr. McCabe: Mr. Blakeslee was subpoenaed as a witness. He is engaged in certain highway work and, with the consent of Mr. Toole, Mr. Toole has agreed that it may be shown in the record that on the night of December 10, 1934, after the hoist was delivered in Great Falls, Montana, at the Blakeslee yard, Mr. Johnson called Mr. Blakeslee on the phone.

Mr. Toole: No, that is not quite, it is almost, right.

Mr. McCabe: I see that there is a stipulation that is prepared. We will read this into the record.

Mr. Toole: The record should show, your Honor, that we are willing to stipulate that if Mr. Blakeslee were here that that is what he would testify to,

but we make the same objection to the materiality of the evidence that we have to all the other evidence in this case.

The Court: I can't hear it until it is read, you know.

Mr. McCabe: Your Honor, please, the stipulation should go farther to the fact that Mr. Blakeslee was present in court and so testified, subject to objection.

The Court: That is what Mr. Toole now said.

STIPULATION

It is hereby stipulated and agreed, by and between the above named plaintiff and the defendant John M. Coverdale and the defendants Coverdale and Johnson, a co-partnership, acting [114] by and through their respective counsel, that if E. H. Blakeslee of Great Falls, Montana, were called as a witness on behalf of the plaintiff in the above entitled action that his testimony would be as follows:

That on or about the 20th day of October, 1934, the said E. H. Blakeslee rented to the defendant Coverdale & Johnson certain equipment consisting of an Ersted two-drum hoist with tractor power to be used by the defendant Coverdale & Johnson in connection with the performance of the construction and improvement work on Augusta-Sun River road.

That pursuant to said agreement the defendant Coverdale & Johnson took possession of said hoist

on or about the 20th day of October, 1934, and used the same for approximately fifty-two days in connection with said construction and improvement work.

That on the 10th day of December, 1934, at about twelve o'clock midnight the said E. O. Johnson called the said Blakeslee at the Blakeslee home in Great Falls. That the said Blakeslee at said time was in bed and said Johnson told the said Blakeslee that he was returning the hoist and equipment that evening and wanted to know where to put the same. It was a cold night and said Blakeslee told said defendant Johnson that he would not go down to his warehouse and said Blakeslee further told said Johnson to make delivery of said hoist to the Blakeslee loading platform at the Blakeslee warehouse. That the said Blakeslee warehouse is in Great Falls.

That the said Johnson had not called the said Blakeslee concerning said hoist and equipment on the said 10th day of December, 1934, prior to the conversation above related, nor had the said Coverdale & Johnson nor either of them, nor any of their servants or employees notified said Blakeslee prior to the above [115] conversation that said hoist and equipment was to be delivered on the said evening of December 10th, 1934.

That the said Blakeslee did not assist in the unloading of said hoist nor did any of his employees, servants or agents, and that said Blakeslee did not see Johnson or any persons with him on the night

of December 10th, 1934. That on the morning of December 11th, 1934, the said Blakeslee found said hoist and equipment on the platform at the said Blakeslee warehouse.

Mr. McCabe: Now, I think the stipulation should go farther and say that Blakeslee was subpoenaed as a witness, and that this evidence is admitted with the same effect as if he had so testified personally in court, subject to any objection you may have.

Mr. Toole: Well, that is all right; you may let the record show that. And then let the record show that the defendants object to all of the evidence offered in the stipulation, upon the ground and for the reason that it is immaterial and does not tend to prove any of the issues in this case, it being immaterial so far as the Doheny girls are concerned, or their successors in interest, or the plaintiff in this case, as to what Johnson was doing on the night of December 10th with respect to the hoist, and that any act of Johnson, in so far as the Doheny girls are concerned, would not be binding upon the partnership or upon Mr. Coverdale.

The Court: Overrule the objection.

FRED M. CHAMBERLAIN,

sworn as a witness for and on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is F. M. Chamberlain. I reside at Augusta. [116] During the month of December, 1934, I was employed by the firm of Coverdale and Johnson. At that time I was acquainted with E. O. Johnson and was acquainted with Mr. J. M. Coverdale. During that period of time up to the 10th day of December, 1934, Mr. Coverdale was present most of the time with Mr. Johnson on the work that they were performing on the highway known as the Augusta-Great Falls Public Highway. I couldn't say as to any certain length of time that Mr. Coverdale had been present on that work; he had been there off and on, had been there most of the time until that time, until the job was finished. While I was employed by Coverdale and Johnson I observed a Ford Sedan V-8 automobile driven by Mr. E. O. Johnson, but I couldn't say whether it was used in connection with the transportation of any employee from Augusta to the work. As to my duties in connection with the work in December, 1934, I done some painting for them, done a little carpenter work, and I kept that bridge hot. I worked on this bridge for Coverdale and Johnson. I was present on the project work at different times.

Q. During that time did you ever see or observe

(Testimony of Fred M. Chamberlain.)

or know of the automobile owned by Mr. Johnson being used in connection with the work that was being performed by the partnership?

Mr. Toole: That is objected to as immaterial and not tending to prove any issue in this case, it being immaterial as to whether or not the car was used at any particular time on the job, that it does not tend to prove the general use of the car as indicated in the pleadings in this case.

The Court: That will have to be connected, of course, but it was a circumstance, now it is proper to go to the jury. Objection will be overruled. [117]

A. No, I can't say that I did.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.)

DR. LAWRENCE L. HOWARD,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Lawrence L. Howard; I live at Great Falls, Montana, at the Racine Apartments. I am a surgeon, a graduate of a medical college, and have been admitted to practice my pro-

(Testimony of Dr. Lawrence L. Howard.)

fession in the State of Montana, and licensed to practice. I have been practicing two years in Montana. Prior to Montana I had had experience in surgical hospitalization work or internship work for six years.

On the morning of December 11, 1934, I received a call to render medical services to some persons, and pursuant to that call I went to Simms, Montana, with an ambulance to pick up some injured parties. When I arrived at Simms I observed persons there requiring medical attention or surgical attention; I was told their names were Mr. Johnson and two Doheny girls—Marguerite and Roberta. I observed the condition of the two Doheny girls at that time. They were in a nearby house about 100 yards from where the accident had occurred. I observed the injuries they had sustained and am able to state now what they consisted of. Take, for instance, Roberta, her injuries were rather numerous. At the time Roberta was seen she was unconscious, in very poor condition and marked shock. Her extremities were cold. She was breathing in a stertorous manner, and bleeding from the mouth [118] and right ear and from a scalp wound. She was coughing up a considerable amount of blood. She had a deep laceration of the scalp on the right side back of the forehead; this laceration extended down to the underlying bone. Her right mandible, that is the jawbone, was broken; she had marked swelling of the right eye and a large bruise over the right

(Testimony of Dr. Lawrence L. Howard.)

side of the face; there was a puncture wound on the upper lip from one of the teeth; she had a large bruise over the sternum, that is the breast bone. Her evidence, from the physical examination, was that she was in considerable degree of heart failure, and there was a large amount of fluid in the lungs. There were lacerations and abrasions of both knees.

Q. Doctor, these lacerations and injuries which you have detailed here, are they such as ordinarily produce physical pain?

A. May I ask a question before I answer that?

Q. Yes, you may ask.

A. May I ask if the patient is unconscious, whether they have pain or not?

Mr. Toole: No, object to that.

Q. Just answer the question: Were these injuries which you have recited, were they such as at the time were capable of producing suffering, physical suffering and pain?

A. I am sorry I can't answer that question Yes, sir.

Q. Was the laceration on the head of such a type as capable of producing pain and suffering?

Mr. Toole: That is objected to. The Doctor has stated that at the time he found Roberta her condition was such that he doesn't know whether she was suffering pain or not. The record does not disclose that she had simply an injury on the head. I am perfectly [119] frank with the Court and jury, and I think

(Testimony of Dr. Lawrence L. Howard.)

Roberta was unconscious immediately after the accident and that she could not suffer pain.

The Court: That is the point right there, Mr. Toole; he should ask whether the injuries were such as to render her immediately unconscious, and he can answer on that question as to whether or no those injuries would cause pain and suffering.

Mr. Toole: Counsel, of course, frames his own question. I was objecting to the question with respect to the injury on the head alone.

The Court: Well, of course, I don't know which was caused first. The lacerations, as I recall, he said that there was a cut down through the jawbone. The lacerations were on the extremities, were they not? You better develop, Mr. McCabe, whether at the time that had elapsed between the time the doctor arrived and any wound that he noticed or laceration, that would have the immediate effect of rendering her unconscious. I think that would be better to show.

Witness: Upon my arrival to observe the condition of these two girls, Roberta was unconscious at that time. She died, I can't tell you the exact minute, but approximately 10:35 a. m. on 12/11/34. I arrived at the scene where I was called upon to go at approximately 6:30 a. m. She lived approxi-

(Testimony of Dr. Lawrence L. Howard.)

mately four hours from the time I arrived there. I was not in constant attendance upon her during the entire period from the time I first saw her up to the time of her death. At the time that I was in attendance upon her she was unconscious. The times I was not there I can't say whether she was conscious or not, only [120] in so far as reading the record of the nurse who was in attendance. It would have been possible during that time for Roberta to have become conscious at any time.

Q. And in the event that during that period she should become conscious, were these injuries, such as you have related, sufficient to produce physical pain and suffering?

Mr. Toole: I object to the question on the ground and for the reason that it is vague and uncertain, suggestive and leading, is not based upon any fact in the record, that there is no evidence in the record from which the doctor can state an expert opinion, and therefore calls upon him for a conclusion which he is not qualified to give.

The Court: Overrule the objection.

A. Yes, sir.

Witness: These injuries that I have related were of such a character as to produce the death or cause the death of Roberta Doheny, and from my observation of the injuries and the death of Roberta Doheny I believe that those injuries were the

(Testimony of Dr. Lawrence L. Howard.)

cause of Roberta Doheny's death. There was considerable loss of blood by the girls.

With reference to Marguerite Doheny I observed her and gave attention to her at that time. I was given to understand the girl I saw was Marguerite Doheny. At the time she was seen she was unconscious, breathing fairly easily, in moderate degree of shock. She had considerable loss of blood from a scalp wound extending from ear to ear along toward the forehead, with the scalp turned back. She was also bleeding from the right ear and from the mouth. She had a fracture of the right femur in the middle third. There were bruises and contusions of the left [121] upper extremity. The femur is the thigh bone, and the fracture was approximately half way between the hip and the knee. At the time I observed Marguerite Doheny she was unconscious.

Q. And these injuries which you have related here, in the event that Marguerite Doheny should have regained consciousness, were they of such a character as would inflict or cause physical pain and suffering?

Mr. Toole: Objected to as calling for a conclusion of the witness, not based upon any facts in evidence, speculative and uncertain, and no proper foundation laid.

The Court: He may answer.

A. May I answer that and say from my experience and from observation of other patients who

(Testimony of Dr. Lawrence L. Howard.)
have had injuries perhaps similar, one would expect them to produce pain and suffering.

Mr. Toole: May I have the answer stricken, because it is not responsive?

The Court: Overruled.

Witness: The approximate time of Marguerite's death was 8:45 p. m. on the same day. From my observation of the injuries from which Marguerite Doheny was suffering at the time, it is my opinion that the injuries were responsible for her death.

For my services in connection with attendance upon these two young ladies prior to their death, the charge I made was \$25.00 on each one, \$50.00 altogether, which was a very reasonable charge for the services rendered.

Cross Examination

By Mr. Toole.

Witness: As far as I know, I don't believe either one of these girls ever regained consciousness after I saw them.

(Witness excused.) [122]

EVA MAY ALLARD,

sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Eva May Allard. I reside in Great Falls. In the month of December, 1934, I resided in Simms, Montana. I am a registered nurse, registered under the laws of the State of Montana.

On the morning of December 11, 1934, I was called to render professional services in the town of Simms. It was about five o'clock in the morning. Pursuant to that call I went on the highway to in front of the James home and Dawson home, the public highway known as the Great Falls-Augusta road. I saw there a girl by the side of the road, and I saw an automobile in front of a tree close to the highway. The front part of the automobile was right up against the tree. I saw there Roberta Doheny lying alongside of the road. I was met by Mr. James and Mr. Dawson and they took me over to the driver; I think his name was Bardon, or something like that; and in the back seat of this car, inside the car, I saw Marguerite Doheny and Mr. Johnson, whose initials I don't know. With respect to Roberta Doheny, it being dark, I did not at that time observe any injuries, or cuts or lacerations on her person; they carried her in the home before I looked to see what was wrong.

(Testimony of Eva May Allard.)

I rendered first aid to the two girls, Marguerite and Roberta Doheny. In rendering first aid the girls were moved on cots from the place where I first saw them. When these girls were moved one of them gave manifestation or sign of pain; I only moved one, helped move one, and that was Roberta; I stayed with her; when we moved her I heard a slight groan. I did not help to remove Marguerite. I saw these girls in Mr. James' home that morning; it was then that I examined them. They [123] seemed unconscious and in shock, and they were covered with blood, and Marguerite had a laceration across her forehead. I did not examine her for fractures; I thought the doctor could do that. I was present when the doctor examined them. With reference to Roberta, he said she had a broken jaw, and with reference to Marguerite I noticed a broken femur, which is the upper bone of the leg. I don't remember whether I observed any bruises on the girls' bodies.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.)

ROBERT DAWSON,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Robert E. Dawson. I reside at Simms, Montana, and was residing there in December, 1934. On the morning of December 11, 1934, I was present at a point on the public highway as it passes through Simms, Great Falls-Augusta highway, where there had been an automobile collision. I looked at the watch at the time I heard the crash, and it was twenty minutes to five. We were sleeping in an upstairs bedroom, and when I heard the crash I got up and picked up a flash-light and went to the window in the front of the house and flashed the light down in front of the house, and it looked like there was something down there, something dark, and I heard some murmur. I say I heard some sort of murmuring, and I just rushed back then and slipped on some clothes, my wife followed me, and went out to the car, and I found the car piled up right against this tree; the front [124] part of the car, the bumper, was against the tree. The time that elapsed from the time of the crash to the time I went out to where the car was, was about as long as it would take a fellow to get downstairs, a minute or two, two or three minutes probably. When I got out there the only persons I observed at that time

(Testimony of Robert Dawson.)

was the driver—I didn't know his name at that time—Mr. Bardon, and Mr. Johnson in the back seat. At that time I had a conversation with Mr. Bardon; I am not just exactly sure what I said at that time, but I asked him how he felt, and all he told me was, "Please get me out of here, get me out of here." I do not remember asking the question at that time how this happened.

You discussed this case with me last week in Simms, and as to whether you asked me whether I had asked Mr. Bardon at that time how this happened, I am not just sure what you did ask, if I did answer that I asked Mr. Bardon that question; I am not sure that I did. My recollection now is that I did not.

When I saw Mr. Bardon there at that time, the under part of the wheel was crushed, broken off, the front seat was shoved ahead, I couldn't say how far, but it was shoved right up so he was right against the wheel, and the wheel was pressing, he was just as far ahead as he could get, and the front seat was jammed up against him. At that time I did not notice any other persons in the car besides the man in the back seat; afterwards I did; the first inkling I had that there might be anyone else there, Mr. Johnson said "Never mind about me," he says, "there's a couple of girls here," he says "get them out." So I went around to the other side of the car, rather, my wife did, and found one girl hanging out of the car, her

(Testimony of Robert Dawson.)

feet were caught in the car and she was hanging with her head down almost to the ground, past the running board. Her feet were inside the car, the seat was [125] shoved ahead and her feet were caught under the hood, the cowl. I noticed another young lady in the car at that time, I guess it was Marguerite, in the back seat, and she was slumped ahead, lying right across the bottom of the car, in the back seat, face down, in a position back of the front seat, just on the floor of the car. At that time I remember asking Mr. Johnson, the man in the back seat, the question how this happened; he said he did not know. There was blood upon the girls at that time; the girl in the front seat was bleeding, was bleeding from the mouth and from a wound on the forehead when I got there, and of course, it was quite a while, I went to get Mr. James before we could move any one, and after that we noticed of course that there was blood on Marguerite.

We had just moved in some furniture in our house and we were going to paper the next day, and we had to move the girls to Mr. James' house, and he got some cots. First, I might say, my wife, I am not sure just who, but we moved the girl in the front seat out, we loosened her legs, and I just took her out of the car and laid her down on the ground, and we got a couple of blankets and covered her, and then Mr. James was there by that time—I had gone to call him—and he brought some

(Testimony of Robert Dawson.)

cots, and then we put the girls on the cots and took them to Mr. James' house. Thereafter I examined the road, this highway, for the distance as it went through Simms there and in proximity to the point where the automobile was in contact with the tree. I observed the automobile at that time. The width of the road at that point I know exactly, because just yesterday Joe Ugrin was out there and he measured the road, and it was about thirty feet; I was there when he measured it. The road then might have been a little bit wider than it was at the time of the collision, but it wouldn't be any [126] appreciable amount, approximately a couple of inches wider now than then. I observed the condition of the gravel on that road; it was evenly distributed over the road; there were no collections of gravel along there at the time. The road there is straight for a mile west and three miles east. The tree, to which reference has been made, from the shoulder of the road I judge it would be about eight feet, eight or nine feet; somewhere in there, on the south side of the road. From my house, the tree is four feet from the fence; I imagine it is about 15 to 20 feet to the house.

At that time I observed the automobile that was in collision there with the tree. Plaintiff's proposed Exhibits Nos. 1, 2, 3, 4, 5, 6 and 7, I identify as pictures of that automobile, and fairly and accurately represent and portray substantially the condition of the automobile at that time.

(Testimony of Robert Dawson.)

Mr. Toole: We have no objection.

Mr. McCabe: Proposed Exhibits for Plaintiff numbers 1 to 7 inclusive may be admitted in evidence without objection. Plaintiff's exhibits 1 to 7 both inclusive are photographs of various parts respectively of the Ford automobile involved herein reference to which exhibits and each thereof is hereby made.

Witness: I was acquainted with the condition of the highway on that day of December 11, 1934. There was no snow or ice on the highway at that time and it was dry. Plaintiff's proposed Exhibit No. 8 I identify as being a picture of that highway, and the tree appearing on the exhibit, indicated by the word "Tree" and the cross mark, is the tree to which I have referred. It is a view of the highway looking east. The condition of the highway as it appears in this picture is in the same condition as it was on the morning when I examined it at the time of the collision. The picture shows two persons standing there with a part of one automobile and parts of two other automobiles, but they were not [127] there that morning; with that exception the picture substantially represents the condition as it was that morning.

Plaintiff's proposed Exhibit No. 9 I am able to identify as a picture of that highway looking west, and shows the tree, or portrays the tree, to which I have referred, indicated by the word "Tree" and a cross mark. The automobiles and persons appear-

(Testimony of Robert Dawson.)

ing therein were not there on the morning of December 11th; of course, Joe Ugrin's car was there, but at the time of the accident there were no cars. When I went to examine the automobile that was in contact with the tree, I then looked on the highway to see if there were any other cars there in close proximity to this car, and there were none. Proposed Exhibit No. 9 substantially shows the condition of the highway looking west from the point where it appears to be taken as the highway goes through the town of Simms, shows the condition the gravel of the road was at the time when I examined it that morning.

Plaintiff's proposed Exhibit No. 10, with the tree indicated thereon by a cross, is the tree and the point in the highway concerning which I have testified as to where the automobile was in contact with the tree, except that the two automobiles shown thereon were not there at the time of the accident. It substantially represents or portrays the condition that the road or highway was in at that time.

On Plaintiff's proposed Exhibit No. 11 I am able to identify the tree that is shown there, and at your request I mark by the letter "D" (for Dawson) where my house is. The picture substantially represents and portrays the condition that the tree was in after the automobile was taken away on that morning.

(Exhibits handed to opposing counsel.)

Witness (In response to Mr. Toole): When I stated that the [128] pictures—Exhibits 8, 9, 10

(Testimony of Robert Dawson.)

and 11—substantially represent the condition of the highway at Simms on that morning, I did not mean that they represent the surface of the highway or the condition it was in that morning as to tracks or anything of that kind; what I meant by that is that there weren't any ridges or anything like that; I testified as to the smoothness of the road, the width of the highway and general smoothness of it, and the tree and my house. As to the surface condition of the highway with respect to tracks, of course many cars had passed over that highway between the date of the accident and the date when the picture was taken. I believe any tracks that appeared there on the morning of December 11th would be obliterated at the time the pictures were taken.

Mr. Toole: Then we have no objection to the admission of the exhibits, with the understanding that they do not portray the condition of the surface of the highway on the date of the accident.

Mr. McCabe: I now offer in evidence Plaintiff's Exhibits Nos. 8, 9, 10 and 11. Plaintiff's exhibits numbered 8, 9, 10 and 11 are photographs of portions of the highway at and adjoining the place where the Ford automobile collided with the tree standing at the side of the highway, reference to which exhibits and each thereof is hereby expressly made.

(Testimony of Robert Dawson.)

The Court: You say they do not portray the surface of the highway. He says that they do with the exception of ridges, and if there were any tracks there they might be obliterated.

Mr. Toole: Yes, that is what I mean.

Witness: (In response to Mr. McCabe): After this collision and we had removed the young ladies to the James home, as soon as it was light we examined the road for any tracks leading from this automobile out on to the road, and observed tracks extending from the wheels of the automobile out on to the surface of the highway, which extended in a sort of gradual curve across the highway to [129] the edge of the road, and then there were tracks running along a foot in from the shoulder of the road for quite a distance east. These tracks that turned, it was a gradual turn over to the left-hand side of the road. I will indicate by a diagram on this paper just how much of a turn or degree of turn those car tracks took; I will make the tree here; I judge that is about how it was; I will make the two tracks as they ran from the automobile; this was on the left side of the tree. I believe that is just about—might have been a little more gradual in here. I now extend the lines of those wheels (tracks?) where I followed it down to the right-hand side of the road, and will indicate by the words "Automobile Tracks." I am sure of and never measured the distance from the

(Testimony of Robert Dawson.)

tree where the car tracks first turned to the left, and I never heard of any measurement, the road is 30 feet wide there, and I imagine it would be back 40 or 50 feet, judging from the angle of that curve and my recollection of what I saw at that time. The car traveled approximately 50 feet, a little better I believe, after it started to turn before it came in contact with the tree, fifty or sixty feet.

Q. Will you please indicate the directions on that and just about where the sides of the road extended, the shoulders of the road, extend it clear beyond, just write the words on here "Shoulder of road," and also here "Shoulder of road." Now, will you please indicate the directions on there by the word "West," the road going west, and the "East" and "North" and "South." Now I understand from your testimony that the car tracks came from the east and going in a westerly direction to the point where the automobile stopped?

A. Yes.

Q. And after it started to turn, the car tracks, I take it, took a southwesterly direction up to the point of contact with the [130] tree. A. Yes.

Mr. McCabe: We now offer in evidence Plaintiff's Exhibit 12.

Mr. Toole: No objection.

The Court: Admitted without objection.

(Plaintiff's exhibit 12 is a diagram made by witness Robert Dawson illustrating his testimony as to

(Testimony of Robert Dawson.)

the course and direction of the automobile tracks appearing on the highway at the time he examined said highway, reference to which exhibit 12 is hereby made.)

Witness: Those were the only car tracks which turned and went between these points and up to where the automobile stopped. Other car tracks on the road did not turn, they extended east and west.

Cross Examination

By Mr. Toole.

Witness: When I looked at the tracks they showed that the car had been proceeding in a westerly direction on the right side of the road, and then when the car reached a point some 50 or 60 feet from the tree it made a turn to the left, and across the road in a turn and right to the tree. I went out and examined the tracks that morning after daylight came. These tracks were just as wide as an ordinary car track, that is one thing that we noticed, that the car did not skid a trifle, according to all the people that were there; the tracks just looked like the same on the side of the road as they did at any point on the curve. The angle that the car turned, from the diagram there I imagine it would be around a 45 degree angle, if you mark the point; it wouldn't be quite a 45, it would be a broader angle than that. There was no evidence of skidding in the tracks at all, and no evidence of any gravel being thrown up out of the tracks,

(Testimony of Robert Dawson.)

and the tracks were just about the width of a tire. Upon the road it was rather evenly loose surface gravel, so that the tracks were quite distinct, we could see them.

Q. And from an examination of those tracks, could you indicate at about what speed the car was traveling?

Mr. McCabe: To which we object as improper cross [131] examination, no proper foundation has been laid.

The Court: That is a new one, on the tracks showing the speed. The speed was not gone into, not proper cross-examination; sustained.

Mr. Toole: I would like to make an offer of proof.

The Court: Not on cross examination. I held—I don't recall the decision—some years ago, offers of proof were not proper on cross examination, and the Supreme Court sustained. You have a right to ask any questions and the Court will pass on them, but offers of proof on cross examination are not proper.

Mr. Toole: Do I understand the Court does not permit the offer of proof?

The Court: Yes, you can direct any question you want to, to this witness.

Witness: It was about twenty minutes to five in the morning that I went out there, and I imagine it was around 6:30 or 7 o'clock, I think, or later, when I went out to look at the tracks. When

(Testimony of Robert Dawson.)

I looked at the tracks I found that the condition of the tracks where the car was turning in making the curve was the same as the condition of the tracks when it was traveling straight on the highway; that there was no evidence of skidding, and we didn't notice any gravel thrown up out of the track.

Q. Now, based upon what you saw there, will you tell me as to whether or not there was any physical condition there indicating high speed?

Mr. McCabe: To which we object on the ground it calls for a conclusion of the witness, improper cross examination, no proper foundation has been laid for the question.

The Court: Sustain the objection.

(Witness excused.) [132]

HERSCHEL JAMES,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Herschel James. I reside at Simms, and was residing there on December 11, 1934. On December 11, 1934, I was called from my home around between 4:30 and 5 o'clock in the morning, and proceeded to this automobile

(Testimony of Herschel James.)

wreck in front of Robert Dawson's home, where a Ford automobile was crashed against a tree in front of the Dawson house, just off of the public highway known as the Augusta-Great Falls highway. There I saw Roberta Doheny lying in the ditch outside of the car; I saw Bardon, I believe is his name, in the front seat, and I saw Johnson in the back seat, and I saw Marguerite Doheny in the back seat. The right-hand side of the car, the side toward Roberta Doheny, the door was open. She had been taken out of there when I got there, she was lying down on the ground. Mr. Bardon was still in the automobile; I lifted him up, lifted his body out of the car. The front seat of the automobile had been pushed forward considerably, and the back of the front seat as it was pushed forward rested against Mr. Bardon's back; he was just up against the steering wheel and his head kind of slumped over it slightly; the bottom part of the steering wheel was broken. They took Marguerite out of the car, laid her on the ground, and in just a very short time put her on a cot and took her over to my house. After that I noticed the condition of the highway at that time. There was no snow or ice on the highway, and it was perfectly dry.

Exhibits, marked for identification numbers 1 to 7 inclusive, fairly represent or portray the conditions substantially the car was in at that time. On Exhibit 6, the seat looks to me that it [133] isn't

(Testimony of Herschel James.)

in its natural position, it should be across the other way. In taking Mr. Bardon out I don't recall that I moved the seat at all; I know I took hold of his body under the arms, and Robert Dawson got on the other side to get his legs free, but I don't recall moving the seat back. With the exception of the front seat being changed around, that exhibit is substantially a representation of the inside of the car at that point at that time.

I am acquainted with the highway that extends through Simms, Montana, known as the Great Falls-Augusta highway. Exhibits 8, 9 and 10 fairly represent substantially the condition the highway was in at the time I examined it on that morning, with reference to the surface and the gravel, and the points indicated on these pictures by the word "Tree" and the mark "X" represent the tree against which the automobile was crashed at the time. I examined the gravel on the highway at that time after the accident; there were no ridges in it whatever; it was smooth or even.

I have had experience in driving automobiles, and driving automobiles on that particular road and other graveled roads, and from my observation of the road at that time it was in perfect driving condition for a gravel road. The road at that time I judge was about thirty feet wide. Plaintiff's Exhibit No. 11 is a fair representation of the condition of the tree that has been testified to in this case, after the automobile was removed.

(Testimony of Herschel James.)

After that, on this same morning, I examined the highway for automobile car tracks leading from this automobile up on to the highway. The point where the automobile was at the time it was in contact and crashed into the tree was off the highway; my recollection is that it was all off the highway. The car tracks showed that the car apparently was going straight west, swerved [134] slightly to the right, right near that little ditch, and then took a turn at approximately a 45-degree angle right across the road to the tree. On Exhibit 12, the marks indicated on there by the words "Automobile Tracks" show approximately the angle at which the car turned, but first, before the car turned that way, it turned to the right slightly, and the track was very distinct right next to this little ditch to the side of the road, a ditch probably six inches deep.

Q. Mr. James, will you please indicate by lines on a sheet of paper the shoulder of the road, or the approximate shoulders of the road as it extends east and west. (Complies). Please indicate the directions east, west, north and south, writing them out. (Complies.) Please indicate on there the tree which is shown in the exhibits, concerning which you have testified, and then indicate on the map the direction or the course of the automobile tracks, as you remember them at that time. (Complies.) Now, which is the shoulder?

A. This indicates the shoulder of the road, and this is the little ditch to the side of the road, and

(Testimony of Herschel James.)

right here is the canal; he apparently was going along this direction, and the car swerved at such an angle as that. The tracks indicate he was going straight, and then he came out like that for a few feet, probably 15 or 20 feet, something like that, and then he turned something like that right straight for the tree. The turn that he took would not be quite as abrupt as that; I know I estimated at the time that he made approximately an angle of 45 degrees.

Q. Will you just draw those lines so that they are more accurate, even if you have to come back farther on the paper. (Complies.)

A. I think that is it.

Witness: That dotted line I have drawn represents the edge [135] of that little ditch by the side of the road. The point between the solid line close to the word "North" on that side of the diagram is approximately the end of the gravel.

Q. And then between the ditch edge and the end of the gravel, . . . You better put the word "Gravel" on there to indicate it, and this, the "Edge of the ditch," put that. So, I take it that the two lines indicated by the words "Edge of Ditch" and "Gravel," that the space in between indicates the shoulder part of the road off the gravel?

A. Yes; of course, there naturally gets some gravel in there, a little gravel in there, but it is more on the shoulder of the road.

(Testimony of Herschel James.)

Q. That diagram, if you make two lines to indicate the automobile tracks, and write "Automobile tracks." (Complies.)

Mr. McCabe: I now offer in evidence plaintiff's exhibit No. 13.

Mr. Toole: No objection.

The Court: Admitted without objection.

Plaintiff's exhibit numbered 13 is a diagram illustrating the testimony of Herschel James with reference to the condition of the highway at the time he examined said highway, reference to which exhibit numbered 13 is hereby made.

Witness: On the two young ladies, when I arrived at the scene, there were indications of bleeding from the two girls; there was a considerable amount of blood on both of them, particularly Marguerite. At that time I recognized the make of the automobile as being a Ford Sedan.

Cross Examination

By Mr. Toole.

Witness: When I went out to look at the tracks I found that the car had been going west on the traveled portion of the road, and before it got abreast of the tree it made a slight turn to the right toward the shoulder of the road, and then made about a 45-degree turn across the road and struck the tree. I would say the car was back east of the tree probably 20 to 30 feet, 25 feet, [136] something along there. The tracks were perfectly clear; there

(Testimony of Herschel James.)

was just enough loose gravel there to make a very clear imprint. They did not indicate any skidding, nor was any gravel thrown out of the tracks that I could see; in other words, the tracks where I saw them crossing the road and where they made the turn were physically about the same as the tracks made while it was traveling along on the straight road. The tires, as I remember them, seemed like they were practically new tires; they were all up, there were none of them flat; and the treads were in good shape.

Q. Mr. James, would you be able, from what you saw of the tracks, the condition in which you saw them, to give an opinion, your best judgment, as to the speed of the car?

Mr. McCabe: To which we object on the ground it is not proper cross examination, no proper foundation has been laid for its admission; the witness has not shown himself qualified to testify.

The Court: No, he said that from his experience the road was in perfect condition—different testimony from the prior witness—that from his experience the road was in perfect condition for travel, and I have written here “for any or all speeds?” with a question mark after it. Overrule the objection.

A. Not from the tracks, no.

Q. Did you observe any conditions, any other conditions, upon which you could base a judgment?

(Testimony of Herschel James.)

A. Condition the car was in.

Q. I had reference to the tracks more than to the car. A. No, sir.

Q. Was there anything about the tracks to indicate excessive [137] speed?

Mr. McCabe: To which we object on the ground improper cross examination, and calls for a conclusion of the witness as to what is excessive speed, and not sufficiently definite.

The Court: He said from his experience the road was in perfect driving condition; now, for slow, fast, medium or what? That is all he said, just driving condition. Now he has a right to develop on cross examination what he means by perfect driving condition,—speed or what-not.

A. No, sir.

Redirect Examination

By Mr. McCabe.

Witness: From the point on the road where I observed the car tracks first commenced to turn to the point where the car struck the tree was a distance of probably fifty feet or such a matter, from where the car started to turn toward the tree. As I remember it, he pulled out to the right there and followed along the edge of that little ditch for approximately twenty feet, and then he made that rather abrupt turn to the tree, so that he traveled

(Testimony of Herschel James.)
approximately 70 feet from the point of the first
turn.

(Witness excused.)

(Noon Recess)

Mr. McCabe: Your Honor, please, may we call
one witness out of order?

The Court: No objection, I presume.

Mr. Toole: No, that is fine. [138]

WILLIAM BERTSCHE,

Sworn as a witness on behalf of the plaintiff, in
answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is William Bertsche. I run
the Bertsche Food Market,—a grocery store, at
721 Central Avenue. I was engaged in that business
in December, 1934. At that time and prior there-
to I had been acquainted with a person by the name
of Roberta Doheny, and at that time had arranged
or promised to employ her in the month of Janu-
ary following. I observed that she appeared to be
the type of person that would make a success in my
business. She appeared to be healthy, a strong, ro-
bust girl, and had very much of a pleasing person-
ality. To commence her employment, the Union
minimum at that time was fifty dollars a month

(Testimony of William Bertsche.)

salary, and as to the range of her salary in the event she proved successful in her work,—the girls I have working for me their salaries run from seventy to ninety dollars a month; those are clerks, and if a girl lives up to the standard with us, in less than six or nine months she would be making seventy dollars a month; after that, it would depend on the girl as to her salary increasing up to ninety dollars a month. She appeared to possess the qualifications that would make a success of her work in my line of business; she had a pleasing personality, which is very important, and she seemed to be in good health and was quick in her motions, and appeared to me that she would make a good clerk.

Mr. McCabe: You may take the witness.

Mr. Toole: No cross examination.

(Witness excused.) [139]

JOE UGRIN,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Joe Ugrin. I reside in Black Eagle, and was residing there in December, 1934, at which time I was a deputy sheriff of Cas-

(Testimony of Joe Ugrin.)

cade County, and had been acting as deputy sheriff for four years.

On the morning of December 11, 1934, I was called upon, by virtue of my office, to proceed to Simms, Montana, to investigate an automobile accident, and I proceeded to Simms at that time. When I arrived there I saw Roberta Doheny and Marguerite Doheny in Herschel James' house in Simms, and helped to remove the girls from the house to a conveyance to bring them into Great Falls. When I moved these girls into the conveyance, they were moaning, both of the girls were moaning at that time. At that time I observed a Ford automobile against a tree and off to the left of the highway as it went through Simms. Plaintiff's exhibits 1 to 7 inclusive, which you show me, substantially represent the condition of the automobile that I saw at that time crashed, in contact with the tree.

I have had several years' experience in driving automobiles, twenty or twenty five years, probably twenty. During the time I was deputy sheriff I was called upon at different times to investigate accidents or collisions in which automobiles and other objects were involved, and have had experience in determining and in learning the damage that an automobile may sustain when it comes in contact with different objects, cars or stationary objects such as trees or posts, as to illustrate the rate of speed a car was going. From my exami-

(Testimony of Joe Ugrin.)

nation of this car, it is hard to tell the approximate speed this car was traveling at the time it came in [140] contact with the tree, but I would judge, the car completely demolished as that car was, must have traveled at a great rate of speed, probably between forty and fifty miles an hour.

When I went out there I observed the condition of the highway where this car was. I had driven out there with my lights on. In approaching the point where the automobile was, in the light of the car I was able to see the road in front of me clearly. The road was smooth; of course it is a gravel road, loose gravel on it; it was in a safe and good condition for travel by automobile. In traveling at that time with my automobile I did not proceed past the point where the automobile was crashed against the tree. I just left my car sitting on the highway, I believe at a point west of where the automobile was in contact with the tree; no, I left the car just as I got to the wreck, at a point on the south side of the road where the car was in contact with the tree. In driving my automobile I didn't have any difficulty in traversing that road at that time, and had no mishaps or accidents of any kind.

Cross Examination

By Mr. Toole:

Witness: In getting out to Simms that morning I drove at a rate of probably 60 or 70 miles an hour. Right at Simms there the road is straight and about thirty feet wide. I looked at the tracks of this auto-

(Testimony of Joe Ugrin.)

mobile, I examined the tracks after I got there. When he got opposite that tree he made a sharp turn, just about the sharpest turn a man could possibly make. I looked at the tracks to see whether it was skidding or not; I couldn't see that there was; I got there quite a while after; I saw no signs of skidding. The car turned as sharp a turn as a car could possibly make. It was a level, smooth road, with [141] surface gravel, loose gravel on it. I don't know how fast I could turn a Ford V-8 myself on a road and make as sharp a turn as it could make without skidding; make it pretty fast, some people can, and some of them can't; I could go down here and cut the corner at forty miles an hour, right in the city, without skidding. I don't know if I could do it on loose gravel, I never tried it. It is more likely I could do it on loose gravel at 25. I couldn't say from the tracks and the sharpness of the turn whether his speed might have been as slow as 35 instead of 40; I am not judging the tracks, I am judging the car, the condition of the car that was there. I haven't judged the speed from the track; that is hard to judge. I don't know from the tracks how fast he was going.

Redirect Examination

By Mr. McCabe:

Mr. McCabe: Mr. Ugrin, I desire to ask a question I overlooked on direct examination, and if counsel has no objection and the Court has none, I would like to open up that avenue of examination.

(Testimony of Joe Ugrin.)

Mr. Toole: No.

Witness: I have not had very much experience in stopping Ford cars by the use of the brakes; I have had a little. I have a '34 Ford car. I have had occasion to stop my car when I was driving at varying rates of speed, by the use or application of the brakes.

Q. Well, are you able to give us an estimate, in your opinion, within what distance a Ford car of a 1934 model can be stopped, at varying rates of speed?

Mr. Toole: Now, if your Honor please, that is objected to because there is no allegation in the [142] complaint with respect to the brakes upon this car; there is no allegation or no claim that the driver of the car failed to use the brakes; there is no evidence in the record at all with respect to the use of brakes; on the contrary, all of the evidence being that the tracks went along straight without skidding, and therefore this witness' opinion as an expert is incompetent because it does not tend to prove any issue in this case.

Mr. McCabe: The purpose of this is to show that had the driver used his brakes, assuming that he was going at these various speeds, he could have stopped the car.

The Court: That is an inference the jury may draw as well as this witness.

(Witness excused.)

FRANK HOLLAND,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Frank Holland. I reside at Simms, and resided there in December, 1934. I was acquainted with the condition of the Great Falls-Augusta public highway, graveled highway, that passes through the town of Simms, in December, 1934. On December 11, 1934, there was no snow or ice on that road, and it was dry. I had a service station in Simms at that time, and my brother-in-law did the repair work, the garage. We occupied the same building there, known as the Malmgren Garage. On the morning of December 11 I was called upon to remove a smashed automobile from the public highway at Simms, Montana, to our [143] garage. My understanding was it belonged to Mr. Johnson; I don't know if I heard his initial, and as to his being the Mr. Johnson who was a member of the firm of Coverdale & Johnson, I don't know, I never met the man. At that time I examined the automobile. It was about eight o'clock in the morning that I removed it from the place it occupied on the side of the highway, and at that time I examined and looked over the automobile and saw the condition it was in. Plaintiff's exhibits Nos. 1 to 7 inclusive I identify as pictures of the automobile in question. After I removed it, it was

(Testimony of Frank Holland.)

taken to the garage that my brother-in-law and I were occupying at the time. After it was removed there on the 11th, I don't remember how long it was there, I don't remember just the date that I sold it; I think it was the last part of February. I did not make any repairs or any changes on the automobile from the time I removed it from the place on the highway to the garage where it was placed. On Sunday, December 16, following the day of the wreck of the automobile, it was in substantially the same condition in the Malmgren garage as it was when it was taken from the public highway at the point where it had crashed into the tree. My brother-in-law's name is Rudolph Malmgren. This automobile that was brought into the garage, with respect to the various parts of it other than appeared to be damaged, was practically a new car, it looked. The damages that appeared on it appeared to me to be made as the result of a collision. I did not examine the brakes on that car at that time.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.) [144]

C. J. PETERSON,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is C. J. Peterson. I am Sales Manager of the Kincaid Motor Company, and have been for two years and three months. We sell the Ford automobile. I have had experience during the past three years in driving Ford automobiles, and have had experience in driving a Ford V-8 De Luxe Sedan, 1934 model. In driving that particular model of automobile I have had experience in stopping the car on graveled highway at varying rates of speed.

Q. And are you able to state within what distance an automobile of that kind and character, brakes being in working condition, in reasonable working condition, that that automobile may be brought to a stop, within what distance under varying rates of speed?

Mr. Toole: That is objected to upon the ground and for the reason that there is no allegation in the complaint as to failure to stop, as an element of negligence; for the further reason that there is no evidence in this record upon which this witness may base any conclusion with respect to stopping the automobile; further objected to because he is being asked to pass upon a question which is not in evidence.

(Testimony of C. J. Peterson.)

The Court: The statute specifies, under proper allegations, such things may be brought into a case, put in controversy,—section 17 something, I forget what it is, but there is no reference to it whatsoever. I think the objection will have to be sustained.

Mr. McCabe: The only purpose is, we feel the general allegations as they appear in this, that this goes to show failure to use the brakes at any time by [145] the driver of this car, because it further shows that had he used the brakes it could have been stopped within the distance traveled.

The Court: There isn't any allegation as to that.

Mr. McCabe: Remember, your Honor, the words are "so recklessly operated and controlled," not only operated but controlled, and we say the failure to apply the brakes is reckless control. The further allegation is that he drove and controlled it in such a way as to permit it to leave the highway.

The Court: That doesn't have anything to do with the brakes that I can see. I think the section 1742 is likely will probably be offered and given in instruction as to the duty of an operator, but there is no allegation basing any negligence on the failure to observe this. Your allegation does not go that far, but it is like the general duty that the Court in instruction gives as to what the operator of a motor vehicle

(Testimony of C. J. Peterson.)

should or should not do at the time. Sustain the objection.

Mr. McCabe: May the record show at this time that we will be permitted at the conclusion of our case to make offer of proof on this.

The Court: Make it right now.

OFFER OF PROOF

(Out of hearing of jury.)

Mr. McCabe: The plaintiff offers to prove by the witness on the witness stand, C. J. Peterson, that the automobile involved in this action, prior to the time of the collision between said automobile and the tree standing to the south side of the public [146] highway, could have been stopped within a distance of fifty feet going at the rate of fifty miles an hour, had the driver George Bardon applied the brakes on said automobile for the purpose of stopping the same. We further offer to prove by the witness on the witness stand, C. J. Peterson, that going at a rate of speed of forty miles an hour the automobile could have been stopped by the driver, George Bardon, within a distance of forty feet. We further offer to prove by the witness on the stand, C. J. Peterson, that at a rate of speed of 30 to 35 miles an hour the automobile could have been brought to a complete stop by the application of the brakes within a distance of thirty feet.

Mr. Toole: Defendants object to the plaintiff's offer of proof on the ground and for the reason that it calls for a conclusion of the wit-

(Testimony of C. J. Peterson.)

ness, and there are no facts in the record upon which to base any conclusion in response to the question. For the further reason there is no allegation in the complaint charging failure to stop within a reasonable distance, and no allegation in the complaint charging failure to stop as negligence, and no allegation in the complaint under which the offer of proof is admissible or proper or competent evidence.

The Court: I will sustain the objection. Neither way around, however, as to equipment would be proper.

(Witness excused.) [147]

RUDOLPH MALMGREN,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to him testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Rudolph Malmgren. In December, 1934, I was residing at Simms, and was in the garage business at that time, operating the Malmgren Garage with my brother-in-law Frank Holland. I remember at that time a Ford automobile, '34 Model De Luxe V-8 Sedan being brought to the garage on December 11, 1934, and it remained in the garage 'til about the last of February. From

(Testimony of Rudolph Malmgren.)

the time it arrived at the garage I did nothing towards changing the car in any manner, and it was in the same condition substantially on the Sunday following the time it was brought to the garage that it was when it was brought into the garage. At that time I examined the steering apparatus connected with that car. I found it was still intact, but it had been cracked, not a worn crack, but a sharp sudden crack. I have had experience in operating cars and automobiles in which the steering apparatus became out of order while I was driving the car.

Q. And when a steering apparatus goes out of order, what happens with respect to the car taking quick sudden turns, or what is the fact?

Mr. Toole: That is objected to as being entirely immaterial, not tending to prove any issue in this case, and incompetent, inadmissible under the pleadings. In the first place, your Honor please, I should elaborate also because counsel is taking an inconsistent position; a moment ago he stated the purpose was to show the car was in good order (Note: Objection was made to the question concerning the steering apparatus, and the [148] objection withdrawn on the statement of plaintiff's counsel that "I am going to show the car was not in a defective condition.") on the first question, and this question is directed to the proposition that if the car had been in bad order

it would have acted in some way differently than what it did.

The Court: You are familiar with some decisions where a thing happens sudden, nobody knows anything about it, to the fact of it. Do you still hold to your objection?

Mr. Toole: Yes, your Honor.

The Court: Very well; have to be sustained then.

Witness: Plaintiff's exhibits 1 to 7 show substantially the condition the car was when it was brought into the garage on the morning of December 11, 1934. I examined the front part of the car above the windshield after it came into the shop, and noticed something that looked like white skin on the top above the windshield.

Mr. McCabe: You may take the witness.

Mr. Toole: No cross examination.

(Witness excused.)

NELLIE B. FULLER,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is N. B. Fuller. I reside at 718 Second Avenue North, Great Falls, and was residing there in December, 1934, and particularly

(Testimony of Nellie B. Fuller.)

on the 12th day of December, 1934. I am a stenographer, and was such on December 12, 1934. I was [149] present at a coroner's inquest conducted by Dr. B. A. Place on the evening of December 12, 1934, to enquire into the death of Roberta Doheny and Marguerite Doheny. At this inquest witnesses were examined by Dr. Place after being placed under oath, and I took down the testimony of the witnesses in shorthand, and after that correctly transcribed it into longhand on the typewriter, and after that the original transcript of the testimony was filed with the Clerk of the Court of Cascade County, Montana. This typewritten transcript of evidence is the transcript of the testimony taken at the time of the coroner's inquest, correctly transcribed from my shorthand notes into longhand typewriting. At the time of the inquest I accompanied Dr. Place, the Coroner, to the Deaconess' Hospital for the purpose of taking the testimony of Mr. Oscar Johnson, and at that time Dr. Place placed Mr. Johnson under oath to testify to the truth, the whole truth and nothing but the truth before he asked him any questions. About the first of this year, I was cleaning out some papers and destroyed the original shorthand notes that were taken at the time of the inquest, so that they are not available at this time.

Mr. McCabe: You may take this: Counsel agrees if he can examine this testimony, we can shorten up the time.

(Testimony of Nellie B. Fuller.)

Mr. Toole: We have no objection.

Mr. McCabe: Well, I presume it may be stipulated that the testimony given by Mr. Johnson at that time may be read into the record in this case.

Mr. Toole: No, you read it. That is, I of course make the same objections to it that I have to all the evidence, that it is not competent under the pleadings. In order to shorten the time, I have no objection to that deposition being read to the jury. What I meant [150] to say was I did not want to stipulate that, in view of the objections I have made to the pleadings, fundamental objections, if it was competent,—that was all. I made the objection that the complaint does not state a cause of action, and that is what I meant. I did not want to find myself stipulating that any evidence in the case is competent, in view of my objection.

DEPOSITION OF OSCAR JOHNSON,

given at Coroner's Inquest:

OSCAR JOHNSON,

Sworn as a witness by the Coroner, in answer to questions put to him testified as follows:

Examination by Dr. B. A. Place, Coroner

My name is Oscar Johnson. I live at Helena. Tuesday morning about five o'clock I was out by

(Deposition of Oscar Johnson.)

Simms. I was in an automobile accident. I was sitting on the back seat; another fellow was sitting in front; I was half asleep; it was pretty cold and I was covered up with a coat; I had it up over my head and I don't know much what happened. We were traveling about 35 miles an hour when the accident happened. Some fellow at a farm house came and helped us into the house. My arm was broken and I had a sore leg. They got Bardon out and left him on the ground and the rest of us went into the house. A man helped me to walk to the house, then they laid me down on a bed and the doctor fixed me up. Marguerite and Bobby and me were in the car; Bardon was driving. Marguerite and Bobby are the Doheny girls. The party had not been drinking. Nobody had any intoxicating liquor of any kind. None of us were intoxicated.

Q. The jury wants to know if you felt sleepy. It was about five o'clock in the morning and none of you had been to bed. How did you feel?

A. I guess I was sleepy; I can't tell much what did happen. I guess I was about half asleep, then it seemed to me something [151] happened some way or other.

Witness: I have no theory myself what might have happened to the driver; everything went smooth all the way through. As far as I know, it was a smooth, uneventful trip from Great Falls to Simms. We came to Great Falls in the first place around eleven thirty, I imagine, at night;

(Deposition of Oscar Johnson.)

I'm not sure; I think it was eleven thirty; I have no watch. It was probably sooner than that. It was quite a while after supper. We all dressed at the hotel and then we waited for a while and after that we left. We were at the Randall Hotel in Augusta. As to whether the driver fell asleep, I couldn't tell you what happened. That probably would be the main theory, I don't know though. It was my car this man was driving; it was in good order; it was a V-8 Ford sedan, de luxe sedan. Marguerite was in the back seat with me; Bobby was in front. Any time previous to the accident the driver did not say anything about feeling sleepy, that I know of. He acted like everything was lovely. I couldn't see anything wrong anywhere.

(Witness excused.)

MRS. AMELIA MOSIER,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Amelia Mosier. I reside at Augusta, Montana. Prior to December 11, 1934, I was acquainted with Roberta Doheny and with Marguerite Doheny. They had been employed by me at housework and cooking. The girls both got salaries of \$25 and \$30 a month, at different times,

(Testimony of Mrs. Amelia Mosier.)

that is, later \$30 a month. In addition to that they got their board and room, which I always [152] consider about a dollar a day, so that I figured their salary when they finally left was equivalent to sixty dollars a month. Marguerite was employed at the same kind of work; I paid her the same salary, and she likewise got board and room in addition to her salary. The work they were doing was work of a continuous and steady nature. Roberta was a very healthy girl, very strong, robust, and was very industrious, honest and a very pleasing personality, and very dependable. Marguerite was of healthy appearance, strong and robust, industrious, very pleasing personality, honest and could be depended upon very much. This employment of these girls was off and on in 1933 and 1934.

Cross Examination

By Mr. Toole.

Witness: When I say off and on, I mean maybe a month or so at a time; I can't just remember or recall it. I wouldn't say, unless I looked up my records, how many months I had Roberta employed; I wouldn't say whether it was six months during those two years. I don't recall with respect to Marguerite either, I wouldn't say because I would have to look up my records first.

(Witness excused.)

MRS. J. S. (HELEN) BOHLER,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Helen Bohler. I reside at Augusta. In the year 1934 and previous years I was acquainted with Roberta Doheny and Marguerite Doheny. During those years these girls were employed by me at different times at housework and cooking. I paid them twenty five and thirty dollars, depending on the [153] season; during hay-ing season they got \$30 a month, for a month or six weeks, and the rest of the time \$25 a month. In addition to that they got their room and board, and a fair estimate of that would be a dollar a day. These girls were employed more during the summer months, spring and summer. I couldn't say of my own knowledge whether they were employed other places when they were not working for me. I never heard they were employed other places. Roberta Doheny, when she was in my employ, appeared to be very healthy and robust; in her habits of industry she was very conscientious, a dependable girl, honest, and very pleasing personality. Marguerite Doheny was in very good health, very robust, honest, very dependable and with a very pleasing personality.

(Testimony of Mrs. J. S. (Helen) Bohler.)

Cross Examination

By Mr. Toole.

Witness: As to whether either of the girls was ever married I don't know, I am sure; I understood they were single.

(Witness excused.)

MRS. MINA C. RANDALL,

Sworn as a witness on behalf of the plaintiff, in answer to questions put to her testified as follows:

Direct Examination

By Mr. McCabe.

Witness: My name is Mina C. Randall. I reside at Augusta, Montana. I am in the hotel business, and during the year 1934 was conducting a hotel at Augusta; during that time I was acquainted with Marguerite Doheny. On the 12th day of December, 1934, Marguerite Doheny was in my employ, and had been prior thereto, doing general housework. She had been in my employ six weeks. I paid her a salary of \$25 a month, and in addition to that she [154] received her room and board as part of her compensation, which I figured at \$35 a month, making a money equivalent of \$60 a month. The work she was doing was more or less of a continuous and steady character. There was a good demand for services of that kind in the vicinity of

(Testimony of Mrs. Mina C. Randall.)

Augusta. During the time she was in my employ her health I would say was very good; she appeared to be a strong, robust girl; she was honest and dependable, and very industrious. On the evening of December 10, 1934, I did not see Marguerite Doheny and Roberta Doheny and Mr. E. O. Johnson and other persons leave my hotel to go to Great Falls, Montana, but I seen them all going out of the hotel in a group about eight o'clock in the evening. Mr. E. O. Johnson is also known and goes by the name of Oscar Johnson; they are one and the same person.

Mr. McCabe: I believe that is all.

Mr. Toole: No cross examination.

(Witness excused.)

HUGH I. SHERMAN,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Hugh I. Sherman. I reside at Great Falls, Montana. I am in the life insurance business, employed with the Northwestern Mutual principally. I have been in the insurance business a little over twenty years. I am acquainted with the standard tables known as The American Mortality Tables. I have them with me. As a part

(Testimony of Hugh I. Sherman.)

of those tables there is also a set of tables known as Annuity Tables. On December 11, 1934, a girl in apparent good health and who at her last birthday was [155] eighteen years of age would have a life expectancy of 43-5/10 years; that is the average length of time she would be expected to live. A girl 20 years of age would have an expectancy of life of 42-2/10 years. The cost to purchase an annuity that would bring to a girl of eighteen an income of \$60 a month, to pay down in a lump sum which would guarantee her \$60 a month for the rest of her life, would be \$19,373.04. For a girl of twenty years of age to purchase an annuity which would pay her at the rate of \$60 a month for the balance of her life would require a lump sum payment, immediate payment, of \$19,094.40.

As to what it would cost to purchase an annuity for a girl of the age of eighteen years that would bring her an income of \$50 per month, I will have to multiply that out; the table gives it on the basis of ten dollars; it would cost \$16,144.20.

To purchase an annuity to pay a girl at the age of eighteen \$55 a month for the rest of her life would cost \$17,758.62.

To purchase an annuity to pay a girl of the age of twenty years \$55.00 a month for the rest of her life would cost \$17,543.20.

These mortality tables are the tables that are used by my insurance company, and are generally used by all insurance companies; every State in the

(Testimony of Hugh I. Sherman.)

Union requires the life insurance companies of the United States to use the American Mortality Tables.

Mr. McCabe: You may cross examine.

Mr. Toole: No cross examination.

(Witness excused.) [156]

HARRY DOHENY,

sworn as a witness on behalf of the plaintiff, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. McCabe:

Witness: My name is Harry Doheny. I was the father of Roberta Doheny and Marguerite Doheny. Roberta Doheny on December 11, 1934, was past 18 years of age, was 18 in April before, and Marguerite was twenty years of age the August before. They had gone to high school; Marguerite had completed her high schooling, and Roberta I think had gone up to her last year, she had gone three years. After the girls left high school they worked around in different places. Roberta during her lifetime enjoyed absolutely good health all the time, and the same condition in health as to Marguerite. The girls were industrious, and very strong and robust. On or subsequent to December 11, 1934, I received information of the injuries which Roberta Doheny and Marguerite Doheny received in an automobile collision, and after that Roberta and Marguerite

(Testimony of Harry Doheny.)

each passed away, died. After the death of Marguerite and Roberta I did not receive any communication, written or oral of any kind, from Mr. E. O. Johnson or Mr. John M. Coverdale relative to the collision in which my two daughters had been injured. I attempted to obtain information from Mr. E. O. Johnson relative to those injuries, but he would give me no information at all.

Cross Examination

By Mr. Toole:

Witness: I don't remember the exact dates I last saw Mr. Johnson, but it was after he got out of the hospital in Great Falls, and I think he was there four or five days. He did not up and leave the country, he came back up to Augusta, I think about five or six, maybe seven, days after the accident, and I [157] think he was there possibly for three weeks after that, maybe a month, I don't recollect. I didn't hear from him since then, and I didn't try to find him; I have enquired of his whereabouts but I could find out nothing, couldn't locate him. I do not know where he is now.

(Witness excused.)

MRS. ETHEL M. DOHENY,

sworn as a witness in her own behalf, as plaintiff, in answer to questions put to her, testified as follows:

(Testimony of Mrs. Ethel M. Doheny.)

Direct Examination

By Mr. McCabe:

Witness: My name is Ethel M. Doheny. I reside in Augusta and was residing there in December, 1934. I was the mother of Roberta and Marguerite Doheny. In the month of December, and particularly on the 11th of December, 1934, I received information that Roberta Doheny and Marguerite Doheny had been injured in an automobile accident, and thereafter Roberta and Marguerite Doheny each died. Roberta's age on the 11th day of December, 1934, was eighteen, and Marguerite's age on that date was twenty. Roberta's health during her lifetime had been very good, and Marguerite during her lifetime also had very good health. Marguerite was employed steady when she left high school; she graduated from high school. I know the two girls were employed at different times and received payment for the work they did prior to the time of their death. Roberta had schooling up to her junior year in high school; she left high school in her junior year. Marguerite graduated from high school in 1933. After the time of the injuries and death of Roberta Doheny and Marguerite Doheny I received neither oral nor written communication [158] from Mr. E. O. Johnson or Mr. John M. Coverdale with reference to the collision or the circumstances or cause of it.

Mr. McCabe: You may take the witness.

Mr. Toole: No cross examination.

Mr. McCabe: The plaintiff rests, your Honor.

(Recess.)

MOTION

(Out of hearing of jury.)

Mr. Toole: Come now the defendants, John M. Coverdale and Coverdale and Johnson, a co-partnership, each for himself and each separately, and each in the respective cases of Ethel M. Doheny as Administratrix of the Estate of Roberta Doheny against John M. Coverdale and E. O. Johnson and in the case of Ethel M. Doheny as Administratrix of the Estate of Marguerite Doheny and against Coverdale and Johnson and E. O. Johnson, and move the Court for a judgment of nonsuit in favor of the said defendants, and in favor of each of them, and against the plaintiff in each of said cases, upon the ground and for the reason:

1.

That the complaint does not state facts sufficient to constitute a cause of action against these defendants or either of them, either jointly or separately.

2.

That the complaint does not state facts sufficient to constitute a cause of action against these defendants either jointly or separately in either of said cases under the Montana Guest Law.

3.

That the plaintiff has failed to offer proof sufficient to sustain the allegations in the complaint or sufficient to sustain [159] a verdict against these

defendants, or either of them, in either of the said causes under the Montana Guest statute.

4.

That the plaintiff has failed to offer and introduce proof sufficient to sustain a verdict against these defendants, or either of them, in said causes for the following reasons:

(a) That there is no sufficient proof of negligence to sustain a verdict.

(b) That there is no sufficient proof of gross negligence and reckless operation of the automobile of E. O. Johnson to sustain a verdict against either of the defendants, either separately or jointly, in either of said cases.

(c) That there is no sufficient proof to sustain a verdict against either of the said defendants, jointly or separately, in either of the said causes, and no sufficient proof to show that either E. O. Johnson or George Bardon were acting within the scope of their employment, or acting as the servants or agents or employees of either the defendant Coverdale as an individual or the defendant Coverdale and Johnson as partners, and there is no sufficient proof to sustain a verdict by reason of the fact that there is no proof to show, or proof, that either the said Bardon or the said E. O. Johnson were acting within the scope of the business of the partnership, or acting within the scope of their employment, in inviting or permitting the Doheny girls to ride with them, or either of them, in the Johnson car at the time of the accident.

(d) That there is no sufficient proof of a duty owed to either of the Doheny girls in either of said cases by either of the defendants, John M. Coverdale or Coverdale and Johnson.

(e) That there is no sufficient proof to sustain a verdict, [160] by reason of the fact that the proof fails to show that either the defendant John M. Coverdale or Coverdale and Johnson failed to perform any duty owing to either of the Doheny girls in either of the cases.

(f) That there is no sufficient proof to sustain a verdict, because the proof fails to show that the injuries received by, and the death of, the two Doheny girls was proximately caused by the gross negligence and operation of said automobile by either the defendant John M. Coverdale or the defendant Coverdale and Johnson.

Mr. Toole: We have fairly short evidence, and the same motion will be made at the close of the trial. Perhaps your Honor will prefer to hear arguments at that time.

The Court: Yes, I think it will be better.

Mr. Toole: Perhaps I didn't express myself properly. Of course it would be proper to move for a directed verdict at the close of the case, and the Court may of course reserve a ruling on motion for nonsuit. There should be a ruling on that, however, before the case is closed.

The Court: Denied, subject to remaking it. [161]

DEFENDANTS' CASE

FRANK HOLLAND,

having been previously sworn, called as a witness on behalf of the defendants, in answer to questions put to him, testified as follows:

Direct Examination

By Mr. Toole:

Witness: I took the witness stand this morning and testified on behalf of the plaintiff in this case. I am the same Mr. Holland who testified this morning. I said that I operate a service station and garage at Simms, and that is the point at which this accident occurred. I was operating the garage and service station there on the 10th and 11th of December, 1934. I said that on this morning I went out to the scene of the accident at about eight o'clock and that I then and there observed the condition of the car and the position it was in. I wasn't in the garage business myself, my brother-in-law ran that part of it, mechanical part, and I only took care of the service station part. I have not been in the automobile repair business myself. I have had occasion while in the business to observe quite a few automobile accidents, and when I went out there that morning I looked at the position of the automobile with respect to the tree. According to the tracks, the automobile was going west on the right-hand side of the road, and about 80 feet from the tree it made a gradual turn into the tree and struck the tree a little bit to the left of the

(Testimony of Frank Holland.)

center of the car, that is, the front end of the automobile, the radiator, struck the tree at a point a little to the left of the center. When the car struck the tree on the angle it was headed, a little bit southwest, kind of on a southwest angle, the hind end of the car, or the rear end, slid about eight or ten inches west; in other words, the hind end of the car moved about eight or ten inches after [162] it struck the tree, it slid, you could see on the ground where the tires had slid.

Q. State whether or not, from what you saw there, you are able to express an opinion as to how fast that car was going when it hit that tree.

Mr. McCabe: To which we object on the ground and for the reason the witness has not shown himself competent to testify, and there is no proper foundation for his evidence.

The Court: He said he had observed several automobile accidents. Better have him describe what kind of accidents he had seen.

Witness: I have seen automobiles where they have collided with one another, but I never saw where one had run into a tree just exactly like this one. I don't believe I ever saw two automobiles hit each other, only after the accident happened; I never happened to be an eye-witness to two of them going together. I have seen their condition after they hit.

Q. And taking the condition of the car and the position it was in, the track, and the way it hit the

(Testimony of Frank Holland.)

tree, could you tell at about what speed it would have been traveling, to have been in that position after it hit?

Mr. McCabe: To which we object, on the ground the witness has not shown himself qualified to answer, no proper foundation has been laid, and there is no fact upon which the witness can express an opinion in this case as to the speed the car was traveling at the time.

The Court: You understood the question; can you do that? A. I think I can, yes. [163]

The Court: It is said in Section 100 of Schwartz on Automobile Accidents that "the probable speed of the machine, in turn, indicates the force of the blow," or how the driver was operating the same; and in section 292, that the position after impact may be shown, and that the whole is for the jury to decide, draw its own conclusion therefrom after the testimony. He may answer.

A. Well, the position the car was sitting in, the angle it was on the tree, it had not been traveling at a high rate of speed.

Mr. McCabe: To which we ask the witness to confine himself to the question, please. The question was whether or not he could do it.

The Court: He says, not a high rate of speed, and you can give your reasons after you have testified, as to the rate of speed.

(Testimony of Frank Holland.)

A. I beg pardon.

Q. I will ask you another question, then. Now then, Mr. Holland, what in your opinion was the rate of speed of that automobile when it hit the tree?

Mr. McCabe: To which we make the same objection.

The Court: He may answer.

A. Well, I would say not more than 25 miles an hour at the most, and possibly less.

Q. Now, why do you say that?

A. Well, for the simple reason that the car, the angle it was sitting agin the tree, when it came into it if it had been traveling at a high rate of speed the rear end of the car would have probably went clear around toward the west, and it only skidded about eight or ten inches. [164]

Cross Examination

By Mr. McCabe:

Witness: I don't believe the car could have been going more than 25 miles an hour or the rear end of the car would have slued around farther than it did. I don't believe it could have been going at that time as high as 35 miles an hour.

(Witness excused.)

RUDOLPH MALMGREN,

having been previously sworn, called as a witness on behalf of the defendants, in answer to questions put to him testified as follows:

Direct Examination

By Mr. Toole:

Witness: I testified when I was on the stand before that I live at Simms and engaged in the automobile and garage business there. I have been engaged in the garage business eleven years. During that time I really have never seen any wrecks only after they was pulled in. I have seen automobiles after they were pulled in, and have repaired a few of the small wrecks in our garage. I have not examined a good many bad wrecks in our garage; I have, since I have been in the garage business, observed cars in one state or another in wreckage, and repaired them where the job wasn't too big for our garage. I seen the car in which Mr. Johnson and Mr. Bardon and the Doheny girls were riding that hit the tree at Simms on December 11th, after it was pulled up to the garage, and looked it over. I observed it so that I am in position now to express an opinion as to how fast that car was going when it hit the tree, approximately.

Q. And what would you estimate as the approximate rate of speed when it hit that tree?

Mr. McCabe: To which we object on the ground that [165] there is no proper foundation laid, the witness has not shown himself quali-

(Testimony of Rudolph Malmgren.)

fied to answer, there is no evidence in the record to sustain any opinion as to this witness as to the speed of the car.

The Court: Sustain the objection as to this witness.

(No cross examination)

(Witness Excused)

JOHN M. COVERDALE,

Sworn as a witness for and on behalf of the defendants, in answer to questions put to him testified as follows:

Direct Examination

By Mr. Toole:

Witness: My name is John M. Coverdale. I live at Anaconda, Montana. I am the Coverdale who is one of the defendants in the two suits here involved. I have been in Anaconda steady, my home has been in Anaconda since 1921. I work at the zinc concentrator there for the Anaconda Copper Mining Company; I am in their employ five days a week, on day wages; I am classed as an operator. Last December, 1934, I was a member of the firm of Coverdale and Johnson; I do some bridge work at times, small contracts. I had a contract for some bridge work at Augusta during December, 1934; Mr. E. O. Johnson was a partner at that time, we

(Testimony of John M. Coverdale.)

had the work together. Mr. Johnson is not now my partner; we dissolved partnership sometime last May.

I am familiar with the V-8 automobile which Mr. Johnson owned. It was never owned by the partnership. It was Mr. Johnson's automobile. I had an automobile of my own, and still have.

On the night of December 10, 1934, I was at my home in Anaconda. I left Augusta, I think, about the 8th of December, [166] 1934, and went directly to Anaconda, and left Anaconda the afternoon of the 11th and started back for Augusta after I heard of the wreck; that was after this accident. I last saw Mr. Johnson for a few minutes sometime, I believe, last February, when I spoke to him about this case and asked him to come here at the trial. He said there had been no papers served on him. I haven't seen him since and do not know where he is now.

It is a fact I have never been to see Mr. and Mrs. Doheny, as they testified, since this accident. The explanation is that I felt as if I wasn't responsible for it and wasn't connected with it in no way, shape or form, and it never occurred to me to go see them, never thought of it.

Cross Examination

By Mr. McCabe:

Witness: I left Augusta December 8, 1934, and went to Anaconda. Prior to that, most of the time, when this contract work commenced, I was in Au-

(Testimony of John M. Coverdale.)

gusta; I wouldn't say all the time. I couldn't tell you the number of days I would be away from the job up to the 8th of December, 1934; I made a trip to Hamilton, and I went over to see my family several times, but as an average I was on the job at Augusta on this contract five to six days a week. Mr. Johnson was not likewise on the job with me during that time; Mr. Johnson was gone to Spokane for a couple of weeks, ten days I think it was, yes, and he was up to the Piskin Dam quite a bit. We had a contract also at Piskin and Mr. Johnson worked on the Piskin Dam job and also on the Augusta job at times. During all that time he resided in Augusta, that was his residence while the work was going on. I couldn't say that Mr. Johnson was left in charge of the work when I left December 8, 1934; I had two foremen there. He was my general partner there. It was [167] up to him to stay there if he wanted to; I had two foremen on the job. He was at Augusta when I left, but we had two foremen taking care of the job. As to whether he was the head man on the job, it just depends whether the foremen would call on him or not for any information. Mr. Johnson was my partner, and when I went to Anaconda he was at Augusta when I left; he was the only member of the partnership on the job after I left there.

I am acquainted with the automobile of Mr. Johnson and also my own automobile, and they were owned by us as individuals. He used his car and I

(Testimony of John M. Coverdale.)

used mine in connection with the work that we were doing, the partnership business.

Mr. McCabe: That is all.

(Witness Excused)

Mr. Toole: Defendant rests, your Honor.

(No rebuttal)

The Court: Gentlemen of the jury, the case is now closed, as far as the testimony is concerned, and you will be excused until tomorrow morning at half past ten. In the meantime you are under the admonition of the Court heretofore given you, not to make up your mind relative to the case, nor permit anyone to talk to you about it; the case is not submitted to you, as you know. So you will be excused and return here tomorrow morning at 10:30.

Mr. Toole: Your Honor, please: Now come the defendants John M. Coverdale and Coverdale and Johnson, a partnership, and in each of the cases heretofore referred to, separately in each case and separately on behalf of each defendant moves the Court to direct a verdict and direct the jury to return a verdict [168] against the plaintiff and in favor of the defendant John M. Coverdale in each of said causes, and against the plaintiff and in favor of Coverdale and Johnson in each of said cases, upon the ground and for the reason that the plaintiff in each of said cases has failed to prove by a

preponderance of the evidence that the injuries to, and death of, the Doheny girls was due to any gross negligence and reckless operation of the said automobile by either of the said defendants; that the plaintiff in each of the said cases has failed to prove by a preponderance of the evidence that either of the defendants, John M. Coverdale or Coverdale and Johnson, were guilty of any gross negligence or reckless operation of the said automobile; that the plaintiff in each of said cases has failed to prove by a preponderance of the evidence that the said E. O. Johnson or George Bardon, in inviting the Doheny girls to ride with them in the said V-8 Ford Automobile, were acting in any manner for and on behalf of the partnership, or acting in any manner in the furtherance of the business or the scope of the business of the partnership. Plaintiff has failed to prove by a preponderance of the evidence in each of said cases that these defendants, or either of them in either of the cases, owed any duty to the said Doheny girls or either of them. Plaintiff has failed to prove in said cases that either of these defendants violated or breached any duty owed by either of them to either of the Doheny girls; and the plaintiff has failed to prove by a preponderance of the evidence that any breach of any duty owed by either of these defendants to either of the Doheny girls was the proximate cause of any damage or injury or death of the Doheny girls.

My associate calls my attention to the fact that I should add to that motion also that the plaintiffs

have failed to prove [169] the allegations contained in the complaint by a preponderance of the evidence.

(Adjourned to 9:30 a. m., May 1, 1936)

May 1, 1936

(Extended argument on Motion)

The Court: . . . motion for a directed verdict will be denied.

Mr. McCabe: That ruling extends, your Honor, to both cases?

The Court: Yes sir. [170]

SETTLEMENT OF INSTRUCTIONS

And thereupon, in the absence of the jury, and present the judge who tried the said cause, the attorneys for the respective parties and the court stenographer, the following proceedings were had with reference to the settlement of instructions:

Mr. Toole: Now come the defendants and offer on behalf of each of the defendants in each of the said cases, their offered Instruction lettered "A". Which said instruction is as follows:

The jury is instructed that a general partner has authority to do whatever is necessary to carry on the business of the partnership in the ordinary manner, and that a partner has no authority to do any other act not within the scope of the ordinary business of the partnership.

The Court: The Court refuses to give Defendants' Offered Instruction lettered "A" in each of said cases.

Mr. Toole: To which refusal of the Court the defendants, and each of them, except.

Mr. Toole: Come now the defendants and object to Court's Instruction No. 3, upon the ground and for the reason that there is no allegation in the complaint upon which to base that instruction, and no proof in the record, and for the further reason that it is not the law in this case.

The Court: Overruled.

Mr. Toole: To which ruling of the Court the defendants and each of them then and there duly except.

Mr. Toole: Come now the defendants and object to Court's [171] Instruction No. 6, upon the ground and for the reason that none of the acts of George S. Bardon or E. O. Johnson in connection with the invitation or the presence of the Doheny girls to ride in the automobile is binding upon or brought home to the defendants John M. Coverdale and Coverdale & Johnson.

The Court: Overruled.

Mr. Toole: to which ruling of the Court the defendants and each of them duly except.

Mr. Toole: Come now the defendants and object to Court's Instruction No. 7, on the ground and for the reason that there is no evidence in the record to sustain the jury in finding that George S. Bardon operated said automobile in a grossly negligent and

reckless manner, and that, even if he did, such operation and conduct on his part would not, under the pleadings and the proof in this case, bind either of the defendants John M. Coverdale or Coverdale & Johnson, and that his gross negligence could not be that of the partnership or of John M. Coverdale.

The Court: Overruled.

Mr. Toole: To which ruling of the Court the defendants and each of them duly except.

Mr. Toole: Come now the defendants and object to the giving of the Instruction No. 16 A, by the Court, upon the ground and for the reason that it does not correctly state the law in this case, and there is no allegation in the pleading or any sufficient evidence upon which to base the said instruction.

The Court: Overruled.

Mr. Toole: To which ruling of the Court the defendants and each of them duly except. [172]

Mr. Toole: Now come the defendants in each of the said cases and on behalf of each of the defendants object to the modification of defendants' instruction, which is Court's Instruction No. 16, as modified, the objection being to the Court's action in striking out the words "and in furtherance" as the same appears in the original instruction between the words "scope" and "of" at the point where they appear for the second time in said instruction.

The Court: Overruled.

Mr. Toole: to which ruling of the Court the defendants and each of them duly except.

And thereafter, the Court instructed the Jury as follows:

INSTRUCTIONS TO THE JURY

Gentlemen of the Jury:

This action has been commenced by the plaintiff, as administratrix of the Estate of Marguerite Doheny, deceased, (and another action by the same plaintiff as administratrix of the Estate of Roberta Doheny, deceased, and these instructions apply to each of said cases), against the defendants, John M. Coverdale and E. O. Johnson, co-partners doing business under the firm name and style of Coverdale & Johnson, to recover damages in alleged sum of Fifty Thousand and Fifty Dollars (\$50,050.00) arising out of injuries and death of Marguerite Doheny, and for a like sum of \$50,050.00 arising out of injuries and death of Marguerite Doheny, which plaintiff alleges was the result of the grossly negligent and reckless manner of operation of a certain Ford V-8 Sedan automobile being driven by one George S. Bardon as an alleged employee of the defendants under the direction of defendant E. O. Johnson, on the 11th day of December, [173] 1934.

The complaint alleges the following facts which the defendants by answers have admitted and therefore plaintiff is not required to prove such facts, to-wit: the death of Marguerite (and Roberta) Doheny on December 12th, 1934, and the appointment and qualification of plaintiff as administratrix of her estate, and that the defendants on December 11th, 1934, were co-partners doing business under

the firm name and style of Coverdale & Johnson; and that during the month of December, 1934, defendant, E. O. Johnson, was the owner of a certain Ford V-8 Sedan automobile involved in this action, Montana License No. 13-1865 for the year 1934;

That prior to December 11th, 1934, one George S. Bardon was an employee of the defendant partnership and was engaged in work directly connected with the business of the partnership in the performance of a certain Highway Contract theretofore entered into by the defendants and the Highway Commission of the State of Montana, and which written contract was for the construction and improvement of certain bridges and stock passes; and that a period of time between on or about September 25, 1934, and February 1st, 1935, was consumed in the performance of said contract;

That on or about October 20th, 1934, the defendants rented from E. H. Blakeslee an Ersted two drum hoist with tractor power to be used in connection with the performance of the aforesaid contract with the State of Montana and agreed to return and redeliver said hoist with tractor power to said E. H. Blakeslee in the event same should be used for a period exceeding thirty days; That defendants took possession of said hoist on or about October 20th, 1934, used same in connection with the performance of aforesaid contract with the State of Montana for a period of approximate- [174] ly fifty-two (52) days and that thereafter, at a time known to defendants but unknown to plaintiff, and between Decem-

ber 1st, 1934, and December 11th, 1934, the defendants shipped said Ersted two drum hoist with tractor power to Great Falls, Montana, for the purpose of redelivering same to the said E. H. Blakeslee.

The following allegations of fact in plaintiff's complaint are denied by the answers of defendants and therefore the plaintiff must by evidence prove such allegations, to-wit:

That on or about the 10th day of December, 1934, at approximately 10 o'clock P. M. the aforesaid E. O. Johnson and George S. Bardon left Augusta, Montana, traveling in the above mentioned automobile owned by E. O. Johnson with Great Falls, Montana, as their destination for the purpose of unloading and delivering to E. H. Blakeslee at Great Falls, Montana, in accordance with the terms of the aforesaid written agreement, the aforesaid equipment theretofore rented by the defendants from the said Blakeslee and at the request and invitation of said E. O. Johnson and George S. Bardon to accompany them to Great Falls, Montana, while they unloaded and delivered aforesaid equipment and thereafter return to Augusta, Montana, the said Marguerite Doheny and sister Roberta Doheny accompanied said E. O. Johnson and George S. Bardon to Great Falls, Montana, in said automobile arriving at Great Falls, Montana, at approximately 11:35 P. M. on the day of December 10th, 1934. That upon their arrival at Great Falls, Montana, the aforesaid equipment was unloaded and delivered by said defendants to E. H. Blakeslee by and through the as-

sistance at the time of the said E. O. Johnson and George S. Bardon. That after said equipment was unloaded and delivered to the said E. H. Blakeslee the said E. O. Johnson and George S. Bardon, Marguerite Doheny and Roberta Doheny left Great Falls, Montana, in the above mention- [175] ed automobile with Augusta, Montana, as their return destination and by way of that public highway known as the Great Falls-Augusta road which is the main highway for public travel between Great Falls, Montana, and Augusta, Montana. That at all times from and after the said persons left Great Falls, Montana, up to and including the time the automobile in which they were riding left the public highway and collided with the tree as hereinafter set forth the said George S. Bardon drove, operated and controlled the movements of said automobile under the direction of the said E. O. Johnson.

That when said automobile with the occupants aforesaid arrived at a point within Cascade County, Montana, on said public highway where same has and takes its direction and course through the town of Simms, Montana, the said George S. Bardon, while in the employ of the defendants as aforesaid and while under the direction of E. O. Johnson, drove and controlled said automobile in such a grossly and reckless manner that said automobile while traveling at a speed of approximately between fifty and sixty miles an hour was permitted by him to turn directly from and move off and from said public highway and crash into and collide with a

large tree growing approximately twelve feet away from and to the side of said public highway in said Cascade County, Montana. That at the time and place on said highway when and where said automobile was permitted by the said George S. Bardon to leave said highway and collide with the tree aforesaid the said highway was approximately thirty feet wide in good and safe condition for travel by automobile and other means of conveyance and extended in an approximate straight line with a clear and unobstructed view for a distance of approximately one-half mile West and approximately one mile East from the place on said highway where the automobile [176] driven at the time by aforesaid George S. Bardon was permitted by said George S. Bardon to leave the public highway and crash into the tree as aforesaid.

That by reason of said automobile being permitted by the said George S. Bardon and the said E. O. Johnson to move off of and away from the public highway and collide with and crash into the tree as aforesaid the said Marguerite Doheny (and Roberta Doheny) was thrown and hurled against the front seat and interior of the said automobile with great force and violence and her body was battered, bruised and cut and as a result thereof she suffered and sustained severe and serious bodily injuries and suffered great bodily pain and mental anguish and thereafter on or about the 12th day of December, 1934, as a result of the injuries sustained by her as aforesaid Marguerite Doheny (and

Roberta Doheny) died all to her great damage in the sum of \$50,000.00. That as a result of the injuries sustained at the time and place aforesaid Marguerite (and Roberta) Doheny was compelled to employ the services of a physician and obtain special hospital care and attention and become obligated for the payment of same to her further damage in the sum of \$50.00.

That at the time of the grossly negligent and reckless operation of the automobile hereinabove referred to and the infliction of the injuries upon the said Marguerite (and Roberta) Doheny, causing her death, the said Marguerite Doheny was of the age of twenty years, in good health and was capable of earning and was earning the sum of approximately \$60.00 per month. (And said Roberta Doheny was of the age of eighteen years, in good health and although she had not been employed in a gainful occupation for approximately three weeks she was capable of earning approximately \$60.00 per month and at the time of her death had [177] arranged to resume employment the following month at a rate of compensation of \$60.00 per month.)

By way of affirmative defenses to the allegations of plaintiff's complaint the defendants allege that if the said Marguerite (and Roberta) Doheny accompanied defendant Johnson and aforesaid Bardon in the automobile claimed by plaintiff that said Johnson and Bardon had not been instructed, directed or granted permission or authority by the

partnership or by John M. Coverdale personally to invite, request, permit or allow any person to ride in said automobile on said trip and particularly not to the said Marguerite (or Roberta) Doheny; and, that said E. O. Johnson and said George S. Bardon were without right, authority, permission or allowance from the partnership or from John M. Coverdale personally to permit or allow any person and particularly not the said Marguerite (or Roberta) Doheny to ride in said automobile at the time and place. And if the said Marguerite (or Roberta) Doheny did ride in said automobile as alleged by plaintiff she did so without the consent, permission, invitation or authority of the partnership or Coverdale personally and that they were invited or permitted to do so by defendant, Johnson, and said Bardon, each on his own behalf and outside the scope of authority given by defendant partnership and not in the transaction of the business of the partnership and that at said time said Johnson and said Bardon were not then acting as a partner, servant or agent of the partnership and were not acting in the course of employment; And that in so riding in said automobile Marguerite (nor Roberta) was not an invitee or guest and her death was not the result of any negligence or the result of any acts or omissions of the said partnership or of John M. Coverdale personally. [178]

These allegations of defendants' answers are denied by plaintiff.

No. 2.

The burden of proof is upon the plaintiff to establish the allegations of his complaint by a preponderance of the evidence.

The term "Preponderance of the evidence," as now and hereinafter used, means the greater weight of the evidence.

No. 3.

You are instructed that it is the law of Montana that:

Every person operating or driving a vehicle of any character on a public highway of this state shall drive the same in a careful and prudent manner, and at a rate of speed no greater than is reasonable and proper under the conditions existing at the point of operation, taking into account amount and character of traffic, condition of brakes, weight of vehicle, grade and width of highway, condition of surface, and freedom of obstruction to view ahead, and so as not to unduly or unreasonably endanger the life, limb, property, or other rights of any person entitled to the use of the street or highway.

No. 4.

You are instructed that ordinary negligence is the failure to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation, or doing what such a person under the existing circumstances would not have done.

No. 5.

The proximate cause of an injury is that cause which in a natural and continuous sequence, unbroken by any new and independent cause, produces the injury, and without which it would not have [179] occurred.

No. 6

The plaintiff has the burden of establishing by a preponderance of the evidence that George S. Bardon, while co-partner E. O. Johnson was present in the automobile, operated the Ford V-8 Sedan automobile owned by E. O. Johnson, in a grossly negligent and reckless manner, while Marguerite (or Roberta) Doheny was a passenger therein, inflicting physical injuries upon the person of Marguerite (or Roberta) Doheny which caused her death; and that the grossly negligent and reckless operation of such automobile under the then existing circumstances and conditions directly and proximately caused the injuries and death of Marguerite (or Roberta) Doheny.

No. 7.

If you believe from the evidence that the manner in which George S. Bardon operated the Ford V-8 Sedan automobile directly and proximately caused the injuries to the person of and death of Marguerite (or Roberta) Doheny then in determining whether the manner of operation of the automobile by him constituted a grossly negligent and reckless operation you are instructed that if you believe

from the evidence that the conduct of George S. Bardon in operating said automobile under the then existing and surrounding circumstances and conditions amounted to something more than ordinary negligence, to-wit, the want of slight care, upon his part, then your verdict should be in favor of the plaintiff.

No. 8.

You are instructed that the law presumes that Marguerite [180] (or Roberta) Doheny was at all times exercising due care for her personal safety and this presumption has the force of evidence in the absence of countervailing evidence sufficient to overcome the presumption.

No. 9.

If you find in favor of the plaintiff and believe from the evidence that Marguerite (or Roberta) Doheny's earning capacity was destroyed as a result of the grossly negligent and reckless operation of the automobile by George Bardon then in determining the damages sustained by her as a result of loss of earning capacity you may consider her age, occupation, state of health, her ability to earn money, non-employment, increase or diminution in earning capacity as age advances, the circumstances that she may not have lived the period of time of her expectancy of life as shown by the mortality tables and that she might have lived a period of time beyond the period of her expectancy of life.

Annuity costs and mortality tables have been introduced in evidence in this case. Such tables are

not to be considered as absolute basis for your calculations but must be used by you as a guide only so far as the facts before you correspond to those from which such tables were computed.

In determining the amount of damages by reason of loss, if any, of earning capacity by Marguerite (or Roberta) Doheny, you may allow such sum as damages as would be required to purchase an annuity equal to the amount that Marguerite (or Roberta) Doheny would reasonably be expected to earn yearly during the period of expectancy of her life. [181]

No. 10.

If you find your verdict in favor of the plaintiff and against the defendants then it will be necessary for you to write into that verdict the amount of damages directly and proximately caused Marguerite (or Roberta) Doheny by reason of the grossly negligent and reckless operation of the automobile by George S. Bardon. In determining this amount you are limited to a sum of money which would have reasonably compensated Marguerite (or Roberta) Doheny for the pain and suffering of mind and body which the injuries caused (if any such pain and suffering were caused) between the time she was injured and the time she died if she survived the injuries for any appreciable length of time and to the further sum that would have compensated her for the impairment, if any, which was caused by the injuries, of her capacity to earn money in the future if she had not been injured,

together with such sum as is reasonable for medical treatment and nursing required to be rendered to said Marguerite (or Roberta) Doheny by reason of any injuries which she may have sustained as aforesaid.

The amount sued for and claimed in the complaint, to-wit, \$50,050.00 must not be to you any criterion in determining the amount of your verdict, if you render any in favor of the plaintiff, but I charge you that in no event shall your verdict be in excess of the amount of \$50,050.00.

No. 11.

You are instructed that it is the law of the State of Montana that:

Any person riding in a motor vehicle as a guest or by invitation and not for hire, assumes as between owner and guest the [182] ordinary negligence of the owner *of* operator of such motor vehicle.

No. 12.

You are instructed that it is not sufficient for the plaintiff to show that George S. Bardon was guilty of ordinary negligence, but the plaintiff must go further and show that said George S. Bardon operated the Ford automobile in a grossly negligent and reckless manner, and the mere fact itself that a collision occurred and that Marguerite (or Roberta) Doheny died, raises no presumption of such gross negligence and reckless operation.

No. 13.

You are instructed that in deciding whether your verdict in this case shall be for the plaintiff or the defendants, you shall be governed solely by the evidence given upon the stand and the law given you in the instructions and not by considerations of sympathy.

No. 14.

The jury is instructed that gross negligence and reckless operation is something more than ordinary negligence; it is the want of slight care.

No. 15.

You are instructed that the owner or operator of a motor vehicle is not liable for any damages or injuries to any passenger or person riding in said motor vehicle as a guest or by invitation and not for hire, unless damage or injury is caused directly and proximately by the grossly negligent and reckless operation by him of such motor vehicle, and you are further instructed in this [183] case that neither the defendant John M. Coverdale and the defendant Coverdale & Johnson, a co-partnership, is liable for damages or injuries to Marguerite (or Roberta) Doheny unless plaintiff proves by a preponderance of the evidence that such damage or injury was caused directly and proximately by the grossly negligent and reckless operation of the automobile by George S. Bardon.

No. 16.

You are instructed that in this case the defendants John M. Coverdale and Coverdale & Johnson,

a co-partnership, deny that E. O. Johnson and George S. Bardon were acting within the scope of the business of the partnership in inviting or permitting Marguerite (or Roberta) Doheny to ride in the automobile of E. O. Johnson on the night of December 10th, 1934, and you are instructed that unless you find from a preponderance of the evidence that the said E. O. Johnson and George S. Bardon were acting within the scope of the business of the partnership in inviting or permitting the said Marguerite (or Roberta) Doheny to ride in said automobile, then your verdict must be for the defendants John M. Coverdale and Coverdale & Johnson, a co-partnership.

No. 16 A.

You are further instructed that if the automobile involved in this action was, at the time of the infliction of the injuries upon Marguerite (or Roberta) Doheny being used for the business of the partnership and that the said Marguerite (or Roberta) Doheny was in said automobile either by invitation or acquiescence of co-partner E. O. Johnson and that the injuries inflicted at the time were the result of the grossly negligent and reckless [184] operation of said automobile as the proximate cause of said injuries, then your verdict should be for the plaintiff.

No. 17.

You are not at liberty to assume the existence of any state of facts unless there is evidence in the

case justifying the conclusion; nor can any member of the jury act on any knowledge he may have of the facts, or on any information he may have acquired from any source other than from the evidence adduced at the trial.

No. 18.

You are instructed that your power of judging of the effect of the evidence is not arbitrary, but is to be exercised with legal discretion and in subordination to the rules of evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number or against a presumption or other evidence satisfying your minds.

No. 19.

A witness is presumed to speak the truth. This presumption, however, may be repelled by the manner in which he testifies, by the character of his testimony, or by evidence affecting his character for truth, honesty or integrity, or his motives, or by contradictory evidence, and the jury are the exclusive judges of his credibility.

No. 20.

You are instructed that a witness false in one part of his testimony is to be distrusted in other parts. [185]

No. 21.

The direct evidence of one witness who is entitled to full credit is sufficient for proof of any fact, except perjury and treason.

No. 22.

As the Court has instructed you, gentlemen of the jury, you are the exclusive judges of the credibility of the witnesses and of the weight and value to be given their testimony. In determining as to the credit you will give to a witness, and the weight and value you will attach to a witness' testimony, you have a right and you should take into consideration the conduct and appearance of the witness upon the stand; the interest of the witness, if any, in the result of the trial; the motives actuating the witness in testifying, if any; the witness' relation to, or feelings for or against, either party, if any; the probability or improbability of the witness' statements; the opportunity the witness had to observe and to be informed as to matters respecting which such witness gives testimony; and the inclination of the witness to speak truthfully or otherwise as to matters within the knowledge of such witness. All these matters being taken into account with all the other facts and circumstances given in evidence, it is your province to give to each witness such credit, and the testimony of each witness such value and weight, as you deem proper.

No. 23.

In determining what are the facts in this case and what verdict, if any, you should return, you

will take into consideration only the testimony of the witnesses upon the witness stand in this case and such documentary evidence and exhibits as have [186] been admitted.

You must not allow yourselves to consider or be in any manner influenced by anything which you have seen, heard or read outside of the evidence and exhibits in this case.

Your verdict, if you arrive at one, must be based solely upon the evidence and instructions of the Court presented and read to you in the course of the trial.

By no remark made by the Court during the trial, nor by these instructions or otherwise, does the Court or did the Court express any opinion as to the facts in the case. It is for you and not the Court to determine what the facts are.

You should not give any weight to statements of counsel heretofore or that may hereafter be made to you which are not supported by the evidence presented to you and by the instructions of the Court. Counsel are, however, privileged to argue and comment upon the law as given in these instructions, in their arguments to you.

No. 24.

You should consider these instructions as a whole. You have no right to consider any part or parts of them to the exclusion of other portions thereof.

No. 25.

When you retire to consider of your verdict you should select one of your number as Foreman whose duty it will be to sign any verdict you may make.

No. 26.

Blank forms of verdicts will be furnished you for your [187] convenience, one of which you will find suitable for such verdict as you may make.

No. 27.

It requires the concurrence of at least eight of your number to make a verdict.

Dated this 2nd day of May, 1936.

W. H. MEIGS,

Judge.

OBJECTION INTERPOSED DURING
ARGUMENT OF COUNSEL

The Court: Let the record show, Mr. Reporter, that while counsel for defendant was arguing the case to the jury that he commented upon the fact that the verdict, if found against the defendants, would fall upon Mr. Coverdale, with the implication that it might bréak him or wreck him financially, with other similar comment. That thereafter, when counsel for plaintiff came to make reply thereto, he said "Why didn't counsel for defendants ask Mr. Coverdale as to his wealth, so that we would have had opportunity to cross examine him as to whether he was worth a million or more

millions or any extent of his wealth, or as to whether the firm of Coverdale & Johnson had liability insurance. Thereupon counsel for defendant moved for a mistrial, and stated "I will say to Mr. McCabe, we have no public liability insurance", and that the Court thereupon directed that he would let the case proceed, and that that matter could be taken up later. Thereupon counsel for defendant requested the Court to admonish the jury relative thereto, and the Court had said, when he thought to call in the Court Reporter, and now repeats: "Gentlemen of the Jury: As forcefully as I can, as earnestly as I can speak, as [188] clear as your minds are now as intelligent gentlemen and men of the community and experienced in life, I admonish that you should erase that remark made by counsel for plaintiff as completely from your mind as you did when in school days you would take your fingers or a piece of sponge and wipe some lettering on your slate, and wipe it out entirely.

Mr. McCabe: I would likewise ask the Court to admonish the jury as to statements made by counsel for defendants and as to Mr. Coverdale's financial responsibility, and his statements as to facts not in evidence, and not to be influenced by them.

The Court: That also the jury will take into consideration. There is an instruction, Gentlemen of the Jury, given you jurors, that this case is not to be determined on sympathy. That means sympathy neither for money or lack of it, neither for parental affection or lack of it.

Mr. Toole: There is one other matter, your Honor, just for a moment: Immediately after I moved for a mistrial the Court suggested that that could be taken up later, and it was after that that I asked the Court to admonish the jury.

The Court: I think I designated that to the Reporter.

Mr. Toole: I didn't know if the record was exactly clear on that.

Thereafter, the jury having retired to consider on a verdict:

Mr. Toole: I would like a ruling on that motion for a mistrial.

The Court: Well, I admonished the jury, and deny the motion. [189]

And thereafter, the jury having retired to consider of their verdict, returned a verdict in favor of the plaintiff and against the defendants in each of said causes, and assessed plaintiff's damages in the sum of \$5,000.00 in each of said causes.

And thereupon counsel for defendants, in each of said causes, requested of the Court and was granted sixty days in addition to the statutory time allowed by law in which to file Bill of Exceptions herein.

And thereafter and within ten days from the receipt by defendants of notice of entry of judgment, the defendants filed their notice of intention to move for a new trial in each of said causes, which said notice is as follows:

[Title of Court and Cause.]

NOTICE OF INTENTION TO MOVE
FOR A NEW TRIAL

To Ethel M. Doheny, as administratrix of the estate of Marguerite Doheny, deceased, (and of the Estate of Roberta Doheny, deceased), as plaintiff in the above entitled action and to Cleve Hall and E. J. McCabe, her Attorneys:

You and each of you will please take notice that John M. Coverdale and Coverdale and Johnson, a co-partnership, defendants in the above entitled action, do hereby give notice of their intention to move for a new trial and a re-examination of the issues in the above entitled action. You will please further take notice that said defendants being the parties aggrieved intend to move to have the verdict vacated for the following causes materially effecting the substantial rights of said defendants:

I.

Irregularity in the proceedings of the adverse party by which the said defendants were prevented from having a fair trial. [190]

II.

Insufficiency of the evidence to justify the verdict and that the verdict is against the law.

III.

Errors in law occurring at the trial and excepted to by the defendants.

You will please further take notice that the said motion will be based upon the minutes of the Court and upon the record of the trial of said action.

Dated this 3rd day of May, 1936, at Helena, Montana.

HOWARD TOOLE,

W. T. BOONE,

Attorneys for defendants, John
M. Coverdale and Coverdale
and Johnson.

That thereafter said defendants' motion for a new trial having duly come on for hearing on the 11th day of May, 1936, the court upon due consideration, thereupon, on the said 11th day of May, 1936, denied each of said motions of said defendants for a new trial.

And now, within the time allowed by law and that granted by the Court, the defendants present the foregoing as their Bill of Exceptions in each of said causes, and pray that the same may be signed, settled and allowed.

Dated this 29th day of June, 1936.

HOWARD TOOLE,

W. T. BOONE,

Attorneys for defendants, John
M. Coverdale and Coverdale
and Johnson.

Due service of the foregoing proposed Bill of Exceptions acknowledged and receipt of a copy thereof admitted this 29th day of June, 1936.

HALL & McCABE

Attorneys for Plaintiff.

[Endorsed]: Filed June 29, 1936. George Harper, Court Clerk. J. E. Hilgard, Deputy. Filed after settlement July 11, 1936. George Harper, Clerk. By J. E. Hilgard, Deputy Clerk. [191]

[Title of State Court and Cause.]

JUDGE'S CERTIFICATE

A stipulation having been filed herein between the plaintiff Ethel M. Doheny and defendants John M. Coverdale and Coverdale & Johnson, a co-partnership, amending the proposed bill of exceptions filed herein by said defendants, and

It appearing that said proposed bill of exceptions having been duly and regularly served and presented for settlement to the undersigned, the judge who tried said causes, as amended by said stipulation,

Now, Therefore, This is to certify that the said foregoing proposed bill of exceptions as amended by said stipulation is full, true and correct and is hereby settled, allowed and assigned as a full, true and correct bill of exceptions of the proceedings

had and taken at the trial of said causes, and the same is ordered filed this 11th day of July, 1936.

W. H. MEIGS,
Judge. [192]

In the District Court of the United States for the
District of Montana, Great Falls Division.

No. 69.

ETHEL M. DOHENY, as Administratrix of the
Estate of Roberta Doheny, Deceased,
Plaintiff and Appellee,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Defendant and Appellant,
and

No. 70.

ETHEL M. DOHENY, as Administratrix of the
Estate of Marguerite Doheny, Deceased,
Plaintiff and Appellee,

vs.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a Corporation,
Defendant and Appellant.

ORDER FOR SUPPLEMENTAL RECORD ON
APPEAL

It having been made to appear to the Court that in the consolidated record on appeal to the Circuit Court of Appeals for the Ninth Circuit in the above entitled causes there has been omitted therefrom by error and accident certain evidence material to the above named plaintiff and appellee consisting of certain written exhibits, hereinafter specified, and which were offered and received in evidence at the trial of above entitled causes on behalf of said plaintiff and appellee:

Now therefore on motion of said plaintiff and appellee it is ordered that said plaintiff and appellee may have certified and transmitted by the Clerk of this District Court to the United States Circuit Court of Appeals for the Ninth Circuit a supplemental consolidated record on appeal in the above entitled actions [193] containing copies of plaintiff's Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24 and 25, and a copy of this order; and

It is further ordered that the Clerk of this District Court upon application of said plaintiff and appellee therefor, shall certify and transmit to the United States Circuit Court of Appeals for the Ninth Circuit a supplemental consolidated record on appeal in the above actions and containing true copies of the said plaintiff's exhibits hereinabove specified, and a copy of this order.

Done this 15th day of March, 1941.

CHARLES N. PRAY

Judge.

[Endorsed]: Filed and Entered March 15, 1941.
C. R. Garlow, Clerk. [194]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
District of Montana—ss.

I, C. R. Garlow, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing volume consisting of 195 pages, numbered consecutively from 1 to 195, inclusive, and consisting of true and correct copies of Plaintiff's Exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24 and 25, and Order for Supplemental Record on Appeal, filed in cases:

No. 69,

Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased,

vs.

United States Fidelity and Guaranty Company, a Corporation;

and

No. 70,

Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased,

vs.

United States Fidelity and Guaranty Company, a Corporation;

constitutes the Supplemental Record on Appeal in said cases, ordered transmitted to the United States Circuit Court of Appeals for the Ninth Circuit by order of the United States District Court for the District of Montana, filed and entered March 15, 1941 at Great Falls, Montana.

I further certify that the cost of the within Supplemental Record on Appeal, amounting to Thirty-one and 50/100ths Dollars, (\$31.50), has been paid by the Appellees.

Witness my hand and the seal of the United States District Court for the District of Montana, at Great Falls, Montana, this 21st day of March A. D. 1941.

[Seal]

C. R. GARLOW,

Clerk as aforesaid.

By C. G. KEGEL,

Deputy Clerk. [195]

[Endorsed]: No. 9668. In the United States Circuit Court of Appeals for the Ninth Circuit. United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Roberta Doheny, Deceased, Appellee, and United States Fidelity and Guaranty Company, a corporation, Appellant, vs. Ethel M. Doheny, as Administratrix of the Estate of Marguerite Doheny, Deceased, Appellee. Supplemental Transcript of Record on. Upon appeals from the District Court of the United States for the District of Montana.

Filed Mar. 24, 1941.

PAUL P. O'BRIEN.

Clerk.

United States Circuit Court of Appeals
for the Ninth Circuit.

No. 9668.

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as administratrix of the
Estate of Roberta Doheny, deceased,

Appellee,

and

UNITED STATES FIDELITY AND GUAR-
ANTY COMPANY, a corporation,

Appellant,

vs.

ETHEL M. DOHENY, as administratrix of the
Estate of Marguerite Doheny, deceased,

Appellee.

PRAECIPE

To: Paul P. O'Brien, Esq., Clerk of the above
Court:

Please have printed, in its entirety, and file the
Supplemental Record on Appeal heretofore certi-
fied by the Clerk of the District Court of the United
States for the District of Montana and transmitted
to the above appellate court in the above entitled
consolidated causes on appeal.

Dated this 22nd day of March, 1941.

E. J. McCABE

Attorney for Appellee,
Great Falls, Montana.

[Endorsed]: Filed Mar. 24, 1941. Paul P.
O'Brien, Clerk.